SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 291.

RICHARD WOOD, EDWARD R. WOOD, GEORGE WOOD, WALTER WOOD, AND STUART WOOD, PARTNERS, AS R. D. WOOD AND COMPANY, PLAINTIFFS IN ERROR,

vs.

THE CITY OF FORT WAYNE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

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1 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-rooms in the city of Fort Wayne, in said district, on the second Tuesday in June, in the year of our Lord one thousand eight hundred and eighty-two, before the Honorable Walter Q. Gresham, judge of the district court of the United States for the district of Indiana, and *ex-officio* judge of said circuit court.

Civil Action.

RICHARD WOOD *et al. vs.* THE CITY OF FORT WAYNE.

OCTOBER 26TH, 1881.

Be it remembered that heretofore, to wit, on the 26th day of October, A. D. 1881, the following proceedings were had in the above-entitled cause:

Comes now the plaintiffs, Richard Wood, Edward R. Wood, George Wood, Walter Wood, and Stuart Wood, by Mess-. Coombs, Bell & Morris, their attorneys, and file herein their complaint against the city of Fort Wayne, with copy and exhibit thereto in these words (*h. e.*). And thereupon summons is issued against the said defendant The City of Fort Wayne, returnable on the first day of the December term next.

And afterwards, to wit, on the 30th day of November, A. D. 1881, the following proceedings in said cause were had:

2 Comes now the plaintiffs by Mess-. Coombs, Bell & Morris, and file their amended complaint herein against the said defendant in these words:

Circuit Court of the United States, District of Indiana.

Richard Wood, Edward Wood, George Wood, Walter Wood, and Stuart Wood, partners doing business under the name and style of R. D. Wood & Co., who are all citizens of the State of Pennsylvania, complain of the City of Fort Wayne, a corporation created under the laws of the State of Indiana, and a citizen of the State of Indiana, and says that on the tenth day of September, 1879, they and the defendants executed a contract by which the plaintiffs agreed to furnish and lay down all the water-pipes for the defendant's water-works in said city, and furnish all the labor and material necessary for the completion of said works, except what was known as special castings, at and for certain prices therein named, all to be completed by the first day of June, 1880, or within such time as might be thereafter agreed upon, which time was afterwards extended to the — day of September, 1880, for which

3 the defendant agreed to pay the prices named in said contract on monthly estimates to be made by the defendant's engineers retaining ten per cent. of such estimates until the final completion of said work, and for six months thereafter; and upon the expiration of said six months to make full and final payment for said work, as in and by said contract, a copy of which is filed herewith, will more fully and at large appear.

And the plaintiffs aver that they well and truly performed all the conditions in said contract on their part to be performed, and completed said work on the first day of September, 1880, and kept the same in good order for six months thereafter, and also *kept the same in good order for six months thereafter, and also* kept the same in good repair for six months after the water was let on in said pipes.

The plaintiffs further say that said work at the contract price therefor, and as estimated by said engineers, amounted to the sum of $147,830.81, of which the defendant retained the sum of $4,242.00 until the final completion and acceptance of said work, and
4 then refused to pay the same or any part thereof, and still refuse, to the damage of the plaintiffs of five thousand dollars, for which they pray judgment.

And for the second and further cause of action the plaintiffs say that on the tenth day of September, 1879, they and the defendant entered into a contract, by which the plaintiffs agreed to furnish all the water-pipes, materials, work, and labor for the Fort Wayne water-works, except special castings, and lay said pipes along the lines and in the streets of said city, as indicated on the distribution map in the office of the water-works trustees, or city engineer's office, and in such other streets and places in said city as might be directed, for which the defendant agreed to pay the prices therein specified, on monthly estimates, as said work should progress, reserving fifteen per cent. of each estimate until the final completion and acceptance of said works, as in and by said contract, a copy of which is filed herewith, will more fully and at large appear.

And the plaintiffs aver that they duly performed all the conditions in said contract on their part to be performed according to the true intent and meaning of said contract, and
5 also performed a large amount of extra and additional work occasioned by the change of location and plans of said works by said trustees and the engineers employed by the defendants; that is to say, before making said contract Willard F. Inman and William E. Newhall, the duly authorized agents of the plaintiffs for making said contract and constructing said works, had an interview with said water-works trustees about the plans for the construction of said work and the location and distribution of the water-pipes, and were by said trustees referred to and shown a distribution map in the office of the city engineer, as indicating the lines and streets on which said pipes were to be laid, from which to make their bid for said work, and before making their bid for said work they, the said Inman and Newhall, examined said distribution map, and found the main pipe leading from the pumping-works to the rese-voir was to cross the St. Mary's river on the lines of Calhoun street, and they thereupon carefully examined the river-bed in said Calhoun street line, and estimated that the crossing of the river at that
6 place would cost the sum of $500.00, and no more, which the plaintiffs aver was a correct estimate of the cost thereof, and the bid of the plaintiffs for said work and this contract thereupon was made with express reference to the crossing of the river at that place, and said contract was thereupon executed, expressly referring

to said distribution map showing the lines and streets on which said work was to be done, that being the only distribution map then on file in either of said offices.

The plaintiffs further say as they were about commencing said work they, the said Inman and Newhall, were informed by said trustees and engineers that they had changed the plan of said work so as to make the crossing of the river on the line of Clinton instead of Calhoun street, and the plaintiffs were ordered to make the crossing on Clinton street; but plaintiffs, by their said agents, after having examined the river-bed at said Clinton street crossing and finding the water in said river seven feet deep (instead of about two feet at the Calhoun street crossing) and the bed of the river composed of quicksand, protested against said change, and declined to go on with the said work unless they would be paid for the extra or addi-
7 tional cost of making the crossing there, over the cost of making the crossing on the Calhoun street line. And thereupon said water-works trustees requested said Inman and Newhall not to make any claim for extra work or extra pay for crossing said river at that time, but insisted upon their going on with said work, promising that they would in future make it all right about such extra work. But the said Inman and Newhall, agents as aforesaid, to protect the plaintiffs, and to avoid all future misunderstanding about the matter, gave the said trustees notice in writing that by reason of said change the plaintiffs would demand extra pay for crossing at Clinton street equal to the difference in the cost of crossing on the Calhoun street; and under the direction of said trustees and said engineers the plaintiffs proceeded and laid out said main pipe across the river on said new line at an additional cost of over and above the cost of crossing on the line of Calhoun street of four thousand five hundred and seventy-five dollars; and within two days after the completion of said work in crossing said river, they, the said Inman & Newhall, agents as aforesaid, made their claim to said
8 trustees for said extra work in writing, with an itemized account of the cost of said work, which said trustees refused to allow, a bill of particulars of which is filed herewith.

And the plaintiffs further aver that they completed said work on the first day of September, 1880, and kept the same in good order & condition for six months thereafter, and for six months after the water was let on in said pipes, at which time the said work was accepted by the defendant, and there was then due to the plaintiffs on account of the fifteen per cent. so reserved by the defendant the sum of four thousand one hundred and seventy-nine dollars and seventy-five cents, and the further sum of four thousand five hundred and seventy-five dollars for said extra work, making together the sum of $8,754.75; but the defendant refused to pay the same, or any part thereof, and still refuses, and said sum still remains wholly unpaid, to the damage of the plaintiff of two thousand dollars, for which they pray judgment.

And for a third and further cause of action the plaintiffs say that on the first day of September, 1880, the defendant was and
9 still is indebted to the plaintiffs in the sum of twelve thou-

sand dollars for work and labor done and material furnished by the plaintiffs for the defendant at its request, and for personal property sold and delivered by the plaintiffs to the defendant, and for money paid, laid out, and expended to and for the use of defendant, at its request, a bill of particulars of each of which remains unpaid; and the plaintiffs pray judgment for twelve thousand dollars.

COOMBS, BELL & MORRIS,
Att'ys for Pl'ffs.

10 *Copy of Contract and Specifications for Constructing Water-Works in Fort Wayne, Ind.*

This agreement, made and concluded this tenth day of September, A. D. 1879, between the city of Fort Wayne, by the trustees of water-works of said city, of the first part, and R. D. Wood & Co., of Philadelphia, Pennsylvania, of the second part—

Witnesseth, that the party of the second part hereby agree, for the consideration hereinafter mentioned, and under the penalty expressed in a bond bearing even date herewith, and hereunto annexed, to do all the work and furnish all the materials called for by this agreement, and in strict accordance with the specifications and requirements, as hereinafter set forth. And that the said city shall have the right to appoint such civil engineer, and inspectors under him, as the trustees of water-works may deem advisable; and that said engineer shall determine the amount of work and materials to be paid for under this contract, decide all questions relative to the execution thereof, and his estimate and decision shall be final and conclusive. The whole to be in accordance with the preceding proposal signed by the said second party, and conformably to the following specifications, both of which are to be mutually considered as to all expressions, intents, and purposes as a part of this contract:

Specifications.

The work to be done consists in furnishing on board cars in Fort Wayne, Indiana, approximately 3,200 tons of cast-iron water-pipes, and 65 tons of sizes ranging from 24 inches to 4 inches diameter.

Also in furnishing in said city the following valves:

Also in trenches, laying pipes and special castings, including back filling, setting valves, constructing and setting valve boxes, vaults, and covers, and setting hydrants, including all crossings of rivers and canals.

The above quantities of pipes and special castings are to be considered approximate only, and it is mutually agreed that the trustees may increase or diminish the same to the extent of 30 per cent. at their option, without in any manner affecting the contract price.

Every pipe and casting shall have cast upon it the initial of the maker's name, the year in which it was cast, and the running number of the casting of the same size. The letters and figures to be cast on the outside, not less than two inches in length and one-eighth of an inch in relief. The weight of each pipe or casting shall be conspicuously painted upon it before delivery with white lead paint.

The pipes are to be made with hub and spigot joints, which must accurately conform in shape and dimensions to the drawings furnished or instructions given.

They will be tested by circular gauges, and no casting will be received which is defective in joint, room, or from any other cause.

All pipes shall be true circles in sections, with inner and outer surfaces concentric.

The straight pipes shall be straight, and curved pipes true to the required curvature in the direction of their axes. They must all be of the specified dimensions in internal diameter from end to end, and the straight pipe shall be at least twelve feet in length.

The weight of the straight pipe shall closely average as follows:

Diameter of pipe.	Length.	Thickness.
24-inch	12 ft. 4½ in.	1 inch.
20-inch	12 ft. 4½ in.	⅞ inch.
12-inch	12 feet.	⅝ inch.
8-inch	12 "	55-100 inch.
6-inch	12 "	½ inch.
4-inch	12 "	½ inch.

Diameter of pipe.	Calking room.	Depth of socket.	Weight.
24-inch	¾ to 7-16 inch.	4½ inches.	3,000 lbs.
20-inch	¾ to 7-16 inch.	4½ inches.	2,520 lbs.
12-inch	¾ to 7-16 inch.	4 inches.	1,020 lbs.
8-inch	5-16 to ¾ inch.	4 inches.	585 lbs.
6-inch	5-16 to ¾ inch.	3½ inches.	410 lbs
4-inch	5-16 to ⅜ inch.	3½ inches.	283 lbs

No pipe will be received the weight of which shall be less than the above specified weight by more than three per cent. for the twelve-inch pipe and upwards, or more than four per cent. for smaller sizes, and no excess of weight above the percentage herein stated will be paid for.

The metal shall be made without the admixture of cinder iron, stove scrap, or other inferior metal, and shall be remelted in the cupola or air furnace. It shall be of such character as to make a pipe strong, tough, and of even grain, that will satisfactorily admit of drilling and cutting, and shall possess a tensile strength of at least sixteen thousand pounds per square inch of sectional area. Specimen rods of the metal used, of a size and form suitable for a testing machine, shall be prepared for the engineer or inspector when required. These specimen rods shall be poured from the ladle at any time either before or the pipe has been poured, as may be required, and shall present a true specimen of the iron used.

The straight pipe shall be cast in dry sand moulds, in a vertical position—pipes of 12 inches diameter and over to be cast with the hub end down, and the curved pipes in loam.

The flask of all pipes shall be allowed to remain in position a sufficient length of time to prevent contraction.

The pipes and castings shall be free from scabs and defects of every nature; no plugging or filling will be allowed.

All pipes and castings of whatever form shall pass a careful hammer inspection, and after having been cleaned to the satisfaction of the engineer or inspector, they shall be carefully coated inside and out with coal-pitch varnish, according to Dr. Angus Smith's process.

The surface must be entirely free from rust, and no casting shall be coated unless examined and approved by the engineer immediately before the process begins. The contractor shall provide a covered way from the coating-room to the dipping vat, so that the pipes may be kept dry until coated. The coal-pitch varnish used must be of a character to make a smooth coating, tough and tenacious when cold, without tendency to scale off.

The pitch and the iron shall be at a temperature of 300 degrees during the casting process. Fresh pitch and linseed oil shall be frequently added, and the vat shall be occasionally emptied and refilled with fresh material. Any pipe or casting that is to be recoated shall first be thoroughly burned off and cleaned. After coating the pipes and castings shall be thoroughly drained of surplus pitch, and when dry shall be subjected to a proof by water pressure of three hundred pounds to the square inch.

All tools, materials, and men necessary for the proper inspection and proof by water pressure shall be furnished by and at the expense of the contractor. The castings shall be weighed after coating.

The engineer or inspector shall be at liberty at all times to inspect the material in the foundry, and the moulding, casting, and coating. The forms, sizes, uniformity, and conditions of all pipes and other castings shall be subject to his inspection, and he may reject, without proving, any casting which is not in conformity with the specifications or drawings. He shall have power to prevent the use of any metal mould or core which in his opinion may be imperfect. He shall have the right to make alterations in the plan, form, or dimensions of the special castings herein mentioned. The inspection will not relieve the contractor of any of his obligations, and any defective pipe or other casting which may have passed inspection at the foundry or elsewhere will at all times be liable to rejection when discovered until the final adjustment and completion of the contract.

The delivery of the pipe shall commence on or before the first day of October, 1879, and be continued with regularity until the completion of the contract, which shall be on or before the first day of June, 1880. Special castings shall be delivered as may be required by the engineer. The ton used shall be 2,000 pounds.

On condition of the true and faithful performance of this agreement and these specifications the said party of the first part agrees to pay the said party of the second part at the rate of—

Thirty-two dollars per ton for all 24-inch pipe.

Thirty-two dollars per ton for all 20-inch pipe.

Thirty-two dollars per ton for all 12-inch pipe.
Thirty-two dollars per ton for all 8-inch pipe.
Thirty-two dollars per ton for all 6-inch pipe.
Thirty-two dollars per ton for all 4-inch pipe—
And at the rate — per ton for all special castings, which is understood to include all expense incident to the manufacture and testing of said pipes and castings, excepting the per diem of the inspector. Payments to be made monthly on the amount of pipe and castings delivered, reserving ten per cent. until the satisfactory completion of this contract.

11 Pipe laying

Will consist in excavating and refilling trenches; in taking up and replacing pavements or other surfaces; in hauling and laying pipes, setting special castings, stop-cocks, air-cocks, check-valves, hydrants, and all other appurtenances incident to the pipe distribution; in cutting pipes, making joints, preparing foundations, building brick or stone vaults, blow-off wells, in repairing damages caused to gas-pipes, sewers, drains, and cisterns; in clearing the streets and grounds of all rubbish or refuse caused by the above work; in furnishing lead and gasket for joints, fuel for melting lead, clay and rope for bands, blocks and wedges for use under pipes, wrought-iron straps for securing caps, reducers, and other parts liable to draw; in furnishing and setting or constructing boxes or vaults for stop-cocks, air-cocks, manholes, including furnishing and fitting cast-iron frames and covers thereto; in furnishing sand and all other materials for masonry, and all tools and labor necessary for the complete fulfillment of this contract.

The following are approximate quantities of the work to be done, the trustees expressly reserving the right of increasing or diminishing them, as may be deemed necessary:

Forty-two hundred lineal feet of 24-inch pipe, with lead and gasket joint.

Thirty-two hundred and thirty lineal feet of 20-inch pipe, with lead and gasket joint.

Nineteen hundred lineal feet of 12-inch pipe, with lead and gasket joint.

Twenty-three thousand and fifty lineal feet of 8-inch pipe, with lead and gasket joint.

Eighty-two thousand four hundred and thirty lineal feet of 6-inch pipe, with lead and gasket joint.

Sixteen thousand seven hundred & eighty lineal feet of 4-inch pipe, with lead and gasket joint.

And setting the necessary branches, bends, reducers, bevel hubs, &c.; cubic yards of stone masonry; cubic yards of brick masonry.

The setting of 200 fire hydrants, three 24-inch valves, two 20-inch valves, three 12-inch valves, twenty-four 8-inch valves, one hundred & thirteen 6-inch valves, thirty-two 4-inch valves.

The above work to be done in the city of Fort Wayne, Indiana, along the lines and in the streets, as indicated on the distribution

map in the office of the trustees or city engineer's office, and in such other streets and places in said city as may be directed.

The trenches for the pipes shall be opened in accordance with the lines and grades as given or directed by the engineer. The top of pipes shall be placed five feet below the surface of street. If placed at greater depth than above specified, such extra depth shall be paid for at the rate of 20 cents per cubic yard of excavation, and if a less depth be required, a corresponding deduction in price shall be made.

Measures shall always be taken by the contractor to insure the safety of the public while the trenches are open by shoring, watching, lights, etc., and the said contractor shall be liable for all damages resulting from negligence in this regard; such damage may at any time be adjusted and paid by the trustees and retained from any monies which may be due, or afterwards become due, to said contractor.

All pipes, special castings, stop-cocks, air-cocks, check-valves, and hydrants will be furnished to the contractor in the city pipe yard or on the cars upon which they are received from the foundry. They will be delivered to him as soon as received, and it shall be his duty to notify the engineer of any defects or breakage before removal from cars, otherwise all damage arising from such cause shall be made good by said contractor. The contractor shall have no claim upon the city for any delay in the delivery of pipes or other materials from the manufactories.

In delivering the pipes along the streets, care shall be taken to distribute them in the order in which they are to be laid, and to so place them as to interrupt traffic and use of streets, crossings, and sidewalks as little as possible; the contractor to be responsible for the protection and safety of all pipes and other materials after their delivery on board cars or in the city pipe yard until laid.

Proper implements and tools for the safe and convenient handling and laying of pipes, &c., such as are satisfactory to the engineer, shall in all cases be used.

No pipes or other castings shall be laid which are known or may be found to be defective, or which have been injured by handling. Notice shall always be given to the engineer or inspector of any such defective or injured casting, and it shall be laid aside and marked with the letter D in white paint, whether detected before or after delivery along the line. If any defective pipe or other casting shall be found to have been laid, it shall be removed and replaced by a sound and unobjectionable pipe or casting without extra charge for such labor.

Each pipe above 12 inches diameter shall be laid upon two blocks (one two feet from the hub end, the other three feet from the spigot end), firmly bedded in the ground and set true to grade, and shall finally be adjusted by means of wedges (two to each block), which shall be left in place; the blocks to be made of sound white pine lumber, four inches by six inches in section, and thirty inches in length; the wedges shall be made of sound oak timber, and shall be three inches by four inches at the butt, and one foot long.

Stop-cocks, air-cocks, hydrants, special castings, and all other parts

pertinent to the supply or distribution shall be set or laid at the required points in such manner as the engineer may direct. Whenever pipes require cutting the work shall be done under the direction of the engineer.

The reducers, bends, and such other parts as are liable to draw shall be firmly secured by straps, and the caps of such branches as require to be capped shall be bolted and well secured. The manhole pipes shall be carefully capped, and all other applications necessary to the working of the distribution, when the water is let on, shall be made and completed.

The straps and bolts used shall be made from the best American refined iron, and the size and workmanship, as well as the material, shall be in all respects satisfactory to the engineer.

Any omission of branches, stop-cocks, or other appurtenances intended to be laid shall be corrected, when required, by reopening the trench, if it has been filled up, and introducing what may have been omitted.

At the time when laid the spigots of the pipes shall be so adjusted in the sockets as to give a uniform space all around; and if any pipe does not allow sufficient space, it shall be replaced by one of proper dimensions. The joint shall, at all points, be at least five-sixteenths of an inch in thickness. The depth of lead shall not be less than two and three-fourths inches for the twenty-four and twenty inch pipes, nor less than two and one-half inches for the smaller pipes.

Gaskets of clean, sound hemp yarn, braided or twisted, and tightly driven, shall be used to pack those joints. When required, a space of a quarter of an inch shall be left between the contiguous pipes.

The lead used shall be of the best quality of pure and soft lead, and suitable for calking and securing a tight and permanent joint.

Before running the lead the joints shall be carefully wiped out to make them clean and dry. The joint shall be run full at one pouring, and the melting pot shall always be kept within sixty feet of the joint about to be poured.

The joints shall be calked by competent mechanics, the calking to be faithfully executed, and in such manner as to secure a tight joint without overstraining the iron of the bell. In all cases the calking shall be done towards the place of the gates, and other points where the lead is likely to be porous, so as to drive it together at these points. The lead, after being driven, shall be flush with the face of the socket.

The pipes and all other castings shall be carefully swept and cleaned, as they are laid, of any earth or rubbish which may have found place inside during or before the operation of laying. Every open end of a pipe shall be plugged or otherwise closed before leaving the work for the night.

In streets and roads, the class of surface before existing shall be replaced, so as to be in every way equal to that surface in materials and workmanship, and satisfactory to the engineer.

A box or vault, of wood or masonry, shall be furnished and set over each of the stop-cocks and over each of the air-cocks and manhole pipes, and the iron frames and covers shall be property fastened

to them. These boxes are to be made of the form and dimensions shown on the plans furnished and approved by the engineer.

In laying the pipes care shall be taken not to move, without the consent of the proper parties, any gas pipes or fixtures, and in crossing these they shall be sustained securely in place until the work is completed. The earth shall be filled in afterwards carefully under and around them, so as to render their position as safe and permanent as before. Any damage done to said gas-pipes, or caused by neglect to attend to them, is to be paid by the contractor.

Whenever it may be necessary to interfere with any railroad notice shall be given to the superintendent thereof, and reasonable time shall be allowed to remove or shore the track. The material from the trenches shall be so deposited as to interfere as little as possible with the public transit or the convenience of the residents of the street or road.

Whenever it may be necessary to cross or interfere with existing drains, sewers, or cisterns, notice shall be given to the engineer, and the crossing or alteration effected according to his directions. Any damage caused to the mason work of the sewers, drains, or cisterns shall be thoroughly repaired, and the said work shall be strengthened, if necessary, to meet any additional strain that the laying of the pipes may impose upon it.

No extra compensation will be allowed the contractor for the repairing of damage done to sewers, drains, or cisterns, or for any labor or materials used in such repairs, it being expressly understood that the price paid per foot for laying the water pipes covers the expenses of all such repairs.

All defective pipes or other pipes not laid, castings or other iron work, or rubbish shall be removed from the streets and deposited in the pipe yard, or at such other points in the city as may be directed. Whenever this clearing of rubbish from the streets or the repairing of pavements is neglected, the engineer will give notice to that effect to the contractor; and if said rubbish be not removed or said repairing be not done within two days thereafter, the engineer may employ other parties to do such work, and the expense thus incurred shall be deducted from any monies due the contractor.

12 The contractor shall keep the work in good repair for six months after the date that the water is let on, and shall correct and repair promptly during that time all leaks and failures of whatever description, and all settlements and irregularities of paving; the work to be delivered in all respects in good condition at the end of that time.

And it is further agreed that the work shall be commenced and carried on at such points, and in such order of precedence, and at such times and seasons as may, from time to time, be directed by the engineer. The rate of progress in pipe laying shall be made to conform to the rate of delivery of the pipes by the founders.

And the said party of the second part hereby further agrees that the said party of the first part shall be, and is hereby, authorized to retain out of the moneys payable to the said party of the second part, under this agreement, the sum of fifteen per cent. on the

amount of the contract, and to expend the same in the manner hereinafter provided for in making such repairs on the line of the said work as the engineer may deem necessary.

And it is further agreed that if, at any time during a period of six months from the date of the final completion of the work contemplated in this contract, any part of said work shall, in the opinion of said engineer, require repairing, and the engineer shall notify said party of the second part, in person or by mail, to make the repairs so required, and if the said party of the second part shall neglect or refuse to make such repairs to the satisfaction of the engineer within three days from the date of the service of such notice, that then the said engineer shall have the right to employ such other person or persons as may be deemed proper to make the same; and the said party of the first part shall pay the expense thereof out of the sum retained for that purpose by the said party of the first part, as before mentioned.

And the said trustees as agents of the party of the first part hereby agree, upon the expiration of the said period of six months, provided that the said work shall at that time be in good order, that the said party of the second part shall be entitled to receive the whole or such part of the sum last aforesaid as may remain after the expense of making the said repairs in the manner aforesaid shall have been paid therefrom.

The said party of the second part hereby agree that they will give their personal attention to the fulfillment of this contract; and that they will not sublet the aforesaid work, but will keep the same under their control, and that they will not assign, by power of attorney or otherwise, any portion of the said work, unless by and with the previous consent of the said trustees, to be signified by endorsement on this agreement.

The said party of the second part hereby further agree that they will commence hauling the pipes and laying the same as soon thereafter as notice in writing shall be given; to commence and progress therewith, so as to complete the whole contract, in accordance with this agreement, by the first day of June, one thousand eight hundred and eighty.

And it is expressly understood that, should the delivery of the pipes to said city be from any cause delayed, the said trustees are authorized to extend the time for completion of the contract, not exceeding six months, and there shall be no claims for damages in consequence of such delay.

And the said party of second part hereby agree to receive, and the said first party hereby agree to pay, the following prices as full compensation for the work contemplated in this contract.

(1.) For laying the pipes and all special castings appertaining thereto, setting check-valves, stop-cocks and air-cocks, including the excavation and refilling of trenches; all bailing, and shoring, and ramming; the taking up and replacing paving or other surface of the streets, the removal of all rejected or surplus materials from the grounds or streets, the repairing of damage caused to gas pipes, sewers, drains, streets, cisterns, etc., and the expense of avoiding such

obstructions; the hauling of all pipes and other castings and appurtenances onto the grounds, and returning those not used to the pipe-yard, the furnishing of all blocks and wedges, and all materials for making the joints, the cutting of pipes, and all other expenses of materials, tools, and labor required by the specifications and incident to this particular work; the lengths to be measured along the centre of the pipe, and in the case of branches as starting from the centre of the main pipe.

Twenty-four-inch pipe, the sum of sixty (60) cents per lineal foot.

Twenty-inch pipe, the sum of fifty-five (55) cents per lineal foot.

Twelve-inch pipe, the sum of thirty (30) cents per lineal foot.

Eight-inch pipe, twenty (20) cents per lineal foot.

Six-inch pipe, the sum of sixteen (16) cents per lineal foot.

Four-inch pipe, the sum of fifteen (15) cents per lineal foot.

(2.) For all brick masonry laid in hydraulic cement mortar, as specified, including the furnishing of all materials, tools, and forms, and setting man-hole heads and covers, the sum of seven dollars per thousand, actual cubic contents.

(3.) —— per cubic yard, actual cubic contents.

(4.) For hauling and setting all hydrants complete, including all and every charge for the same, the sum of —— each.

(5.) For furnishing and setting all wooden stop-cock and air-cock boxes, including fitting and securing the iron covers, the sum of —— each; cost is included in price for pipe laying.

(6.) For furnishing and securing in place all wrought-iron work, the sum of seven cents per pound.

For hauling and setting all hydrants and valves complete, including all and every charge included in delivery and setting the same, the price is covered by the above-named price for laying pipe.

Any unfaithful or imperfect work that may be discovered before the final acceptance of the work shall be corrected by contractor, or by the city at his expense. The inspection of the work will not relieve the contractor from any obligation in this respect.

If any employee on the works shall appear incompetent or disorderly, the trustees can require his discharge and prevent his further employment on the work.

In the absence of the contractor from any part of the work, his superintendent or foreman in charge shall receive and obey instructions of the trustees or their inspectors.

Fifteen per cent. of contract price shall be retained by the city until the termination of the time of guarantee as indemnity for and to be expended in making good any damage which may be caused to said city or citizens thereof by reason of the failure of said contractor to carry out all and singular the stipulations herein contained, the contractor to give his personal attention to the work, and not sublet the same or any part thereof without the written consent of the trustees. Failure to comply with this stipulation or to prosecute the work, as hereinbefore set forth, either as to rate of progress or otherwise, shall be deemed a sufficient cause of forfeiture, and the trustees shall have the right to declare the contract forfeited, and any damage occurring therefrom shall be paid by said contractor.

It is hereby further understood and agreed as follows: That parties having contracts for all or any part of said water-works shall indemnify and save the said city of Fort Wayne harmless from and against all claims against said city, under any law of the State of Indiana, for labor performed or materials furnished for said water-works, and shall furnish the said trustees with satisfactory evidence, when called for by them, that all persons who have done work or furnished materials under this contract, for which the said city may become liable, have been fully paid or satisfactorily secured; otherwise the said trustees shall have the right to pay and satisfy all such claims, and retain the amount or amounts so paid out of any moneys that may be due said contractor or contractors.

And it is hereby agreed that no claim for extra work shall be made or entertained, unless such extra work shall have been done in obedience to a written order of the engineer & trustees, and a stipulated price for same agreed upon whenever such stipulation may be practicable. When otherwise, such claims to be made to the trustees in writing within ten days after the completion of such extra work, or before the payment of the next succeeding monthly estimate after such work is done, failing to do which all rights of the contractor to such extra pay shall be forfeited.

13 And the said party of the second part further agree that they will execute a bond, in such sum and with such sureties as shall be approved by the trustees, for the faithful performance of this contract, conditioned to indemnify and save harmless the said city and the said trustees from all suits or actions by reason of or in any manner appertaining to the performance of the work herein contemplated.

The said trustees shall have the right to make any alterations in the extent, dimensions, form, or plan of the work contemplated by this contract either before or after the commencement of construction. If such alterations diminish the quantity of work the price paid shall be proportionately diminished, and no anticipated profits allowed for the work omitted. If they increase the work such actual increase to be paid for at contract rate for work of its class.

All loss or damage arising out of the nature of the work aforesaid or from the action of the elements, or from any unforeseen obstructions, or any difficulties that may be encountered in the prosecution of the same, also for all expenses which may be incurred in consequence of the temporary suspension of any part of said work, shall be incurred by the contractor without extra charge to said city.

Payments to be made monthly for all work done and materials furnished, excepting the reserved percentage as hereinbefore set forth, which shall be retained until the termination of contract guarantee.

Any doubt as to the meaning of the foregoing specifications will be explained by the engineer, who shall have the right to correct any errors or omissions in them necessary to the fulfillment of their intention; the action of such correction to date from the time the engineer gives due notice thereof.

And it is hereby expressly understood and agreed that the said trustees, as agents of the party of the first part, reserve the power to

suspend the execution of this contract, and to annul the same whenever the other contracting party hereto fail to comply with all and singular the terms and stipulations as herein set forth, and that such suspension or annulment shall not affect the right of the city to recover any damages from such failure.

In witness whereof the parties have hereunto set their hands and seals the day and year above written.

The City of Fort Wayne by the trustees of water works:

[Seal of the City of Fort Wayne.]

CHRISTIAN BOSEKER. [SEAL.]
CHARLES McCULLOCH. [SEAL.]
HENRY MONNING. [SEAL.]
R. D. WOOD & CO. [SEAL.]

Signed and sealed in presence of—as to R. D. Wood & Co.—
CHARLES SPARHAUK.
JNO. BARCLAY JONES.

Approved by the city council September 15th, 1879.
JOHN H. TRENTMAN, *Clerk.*

14 EXHIBIT A.

Expense River Crossing, Fort Wayne, Ind,

1879.			
Novem. 4.	Rubber coats, $18; gloves, $2	20	
	Pay-roll, 368 days & 4½ hrs.' work	667	10
	3 bales jute rope, 1,088 lbs., 3½	38	08
	Plank, 50; K. Bbl., 1; exp. getting Bass pump, 12.50	14	
	Candles, 35; rosin, 25; machine oil, 25		85
	Rubber coat, $5; hauling engine, $5	10	
	Sundries, 1; exp. on Toledo pump, 6	7	
	Mach. oil, 45; lumber, 4.31	4	76
	Ticking, 50, ulamin, 50; machine oil, 20	1	20
	Hinges, 25; machine oil, 28; teaming, 1.00	1	53
	Saw & clog, 35; rosin, leather, & saw, 75	1	10
	Expense Toledo pump	25	
Nov. 18th.	Pay-roll No. 2, 294 ds, 7 hrs.' work	520	10
	Expense, 50; oil can & funnel, 40		90
Nov. 20.	J. Fox, for coal	54	65
	Rhinesmith & Simonson	179	91
	Rubber coats, $6; straw, 1.30	7	30
Nov. 29.	Jas. Sheridan, for running engine	30	
Dec. 1.	Teaming	1	50
	A. J. Reed (horse hire)	38	
	A. C. Perrin "	9	40
Dec. 2.	Pay-roll No. 3, 123½ ds.' work	329	95
5.	Bags, 50; Coombs & Co., 1.57	2	07
	C. Graffmiller (clay)	13	60
	F. C. Staphlet, 2 boat pumps	7	00
	Clasp		15

Dec.	10.	M. Baltes (cement)	12	
	13.	Staut & Steffy, elbows for pump	4	50
		46 ds., by W. F. Inman, 10	460	
		46 " L. K. Eddy, 3	138	
Dec.	31.	Rhinesmith & Simonson	38	54
15		F. Henry Meyer, bl'ksmith, for lumber	17	80
1880.				
Jan'y	14.	E. Vordermark & Son (rubber boots, &c.)	87	45
		McCulloch & Richy (hardware)	21	11
		Lunches for men, $6; hauling engine, 1	7	
		Amount carried forward	2,771	55
Jan'y	14.	Amount bro't forward	2,771	55
		32 ds. with express wagon, 2.50	80	
	19.	F. D. Paulus, running engine	180	
	28.	Morgan & Beach, for hardware	22	65
		H. J. Trentman & Bro. (oil)	7	91
		Maul	1	00
		Cochrane & Humphrey, lumber & labor, Nov. 29	75	40
	31.	C. L. Olds & Co., labor	27	80
Feb'y	2.	Killian Baker, lumber	37	73
	12.	Prescott Bros. & Co., hardware	19	15
		Ft. Wayne Fire Dep't (Steamer Randall)	109	60
		Expense, Toledo pump	18	
	27.	Moming & Co., bags	42	30
		Fort Wayne Gas Co. (coke)	9	25
M'ch	2.	Bass Foundry & M. Works, repairs, pump	5	50
	11.	Kerr Murray, suction for pump	97	23
July	27.	Pay-roll No. 20, 379 ds.' work	611	86
		21 ds. from July 12, by W. F. I., 10	2	10
		21 " " L. K. E	70	
		Bolts, 95; W. H. Hunting, teaming, 9.05	10	
		Blacksmith, $21; lumber, 5; bags, 3.75	29	75
Aug.	10.	John Methly, wood & coal	18	75
	14.	A. Muerhead & Co.	12	75
		Rhinesmith & Simonson, lumber	105	33
	23.	Jas. Sheridan, running engine	120	
		Hoop iron, 1; telegram, 60; pails, 88	2	48
		Teaming	2	50
16		Boseker & Co., reparing pump	9	20
		Killian Baker, lumber	12	22
		Prescott Bros. & Co., hardware	32	92
Sept.	8.	C. L. Olds & Co., labor & material	19	15
	15.	D. Shordan, running engine	93	50
		21 days' use express wagon, 2.00	52	50
		21 " " buggy, 3	63	
		Use of tools	90	
		Blacksmith, 3.75; mach. oil, .50	4	25
			$5,075	23

Bill of Particulars for 3rd Paragraph.

PHILADA., *May 4th*, 1881.

Trustees of water works, Fort Wayne Ind., to R. D. Wood & Co., Dr

To am't reserved as guarantee on contract	4,179 75
" " exchange charged on remittances	183 89
Lowering 24-inch pipes formerly deducted	73 95
Fr't on pump to Toledo	4 54
" " 24-inch suction pipes	108 36
Laying 16-in. pipes 5,166 f't at 2c.	103 32
$5.00 per M on 22,300 brick in large hydrants	111 50
Extra labor digging out & setting 20 valve boxes at 1.50	30
Changing location, laying hydrant Wayne & Chit. st.	21 30
Extra expense caused by additional reducers & plugs	134 00
Lead & yarn	48 70
Derrick	50
Counsel fees, State *v.* City	45
Extra exp. on river crossing with 24-in. pipe, caused by change of original plan, as per our letter of Nov. 5, 1879	4,575
17 Extra expense caused by special casting not fitting, and delay in receiving same in 20' line	750 00
149 wooden valve boxes, difference between those furnished and those contracted for, at 3.00	447 00
Cracked pipes on hand	203 62
	$11,069 30

And afterwards, to wit, at the December term of said court, before the Honorable Walter L. Gresham, judge as aforesaid, on the second Tuesday in December, A. D. 1881, the following proceedings were had:

Come now the parties, and, on motion, the defendant is ruled to answer said complaint.

And afterwards, to wit, at the said term of said court on the 14th day of said month, the following proceedings in said cause were had:

Comes now the defendant, by Mess. Ninde & Ellison and A. Zollars, her attorneys, and files her demurrer to the second paragraph of the said complaint, and the court, after hearing the argument of counsel, doth now overrule the said demurrer; to which ruling the defendant doth now except.

18 And afterwards, to wit, on the 15th day of December, A. D. 1881, at the said term of court, and before said judge, the following proceedings were had:

Comes now the defendant, by counsel, and files her answer to said complaint in six paragraphs, in these words:

In the United States Circuit Court, District of Indiana.

RICHARD WOOD, EDWARD WOOD, GEORGE WOOD, WALTER WOOD
vs.
THE CITY OF FORT WAYNE.

1st. Comes now The City of Fort Wayne, by counsel, and for answer to each paragraph of plaintiffs' complaint, denies each and every allegation therein contained.

2d. For a second and further answer to said complaint, the defendant says that before the commencement of this action it fully paid to said plaintiffs every claim and demand they had against it of every nature.

3d. For a further and a third answer to said complaint, the defendant says that by said contract referred to in said complaint and filed with it as a part of the same, which is hereby referred to and made a part of this answer, said plaintiffs agreed to furnish and lay for this defendant the water pipes mentioned in said contract, and as therein provided; that by the terms of said contract the plaintiffs agreed, among other things, to excavate and refill all trenches
19 in the laying of said pipe, and to replace all surface earth and all street pavements that might be disturbed in digging said trenches for such pipes, so that such surface earth and pavements should be left in as good condition as they were before the digging of such trenches, and to the satisfaction of the city engineer. It is further stipulated and agreed in said contract that if the plaintiff should neglect to so replace such surface, streets, and pavements that the engineer of the city might give notice to the said plaintiffs of such fact, and that a neglect on their part to so replace said surfaces, streets, and pavements, he or the defendant might have the same done and deduct the cost of the same from any amount due the plaintiffs for the furnishing and laying of the pipes aforesaid.

And the defendant says that the plaintiffs neglected to replace said surfaces, streets, and pavements over and along the trenches dug by them, although notified by said engineer so to do; that thereupon the defendant, by its engineer and officers & servants, caused a portion of the same to be done and paid for the same in the sum of fifteen hundred dollars, and that portions of said surface, streets, and pavements yet remain to be refilled, replaced, and placed in the same condition as before as agreed upon; that the same will reasonably cost fifteen hundred dollars. And defendant says
20 that all of the materials furnished and labor performed by the plaintiffs for the defendant were furnished and performed under said written contract, and not otherwise.

Wherefore it demands judgment that the sum of three thousand be recouped from any amount that may be found due the plaintiffs.

4th. For a further and fourth answer to that part of said complaint that sets up claims for damages by reason of changes made by the defendant in its plans and maps and location and distribu-

tion of pipes and places of laying the same, said defendant says it admits it entered into a contract with the plaintiffs, a copy of which is filed with the complaint; that all the work ever done, labor performed, or materials furnished by the plaintiffs to or for this defendant was under and by virtue of said contract.

And the defendant further says that at the time said contract was executed it was stated to said plaintiffs and agreed that no map or plan of distribution of pipes had as yet been made, but that the defendant's engineer, Mr. J. D. Cook, would in a short time make and prepare such map and plan of distribution, and place the same on file in the office of the trustees of the water-works or civil engineer of said city; that that map and plan was to be the map and
21 plan referred to in said contract, and upon which the work was to be done, and was to be the plan, and to designate the streets upon which said pipes were to be laid, to all of which said plaintiffs then agreed; that said Cook did prepare a plan and map, and the same was filed in said office of trustees & city engineers; that when the plaintiffs commenced work they inquired where said pipes were to be laid and placed, and thereupon this defendant's city engineer pointed out to the plaintiff where said work was to be done, and, at the request of said plaintiff, prepared a map and plan showing the manner and way said pipe was to be laid under said St. Mary's river, on the line of Clinton street, which was accepted by said plaintiffs, and which was in accordance with said map & plan prepared by said Cook; that plaintiffs then commenced work on Clinton street in excavating & laying pipes under the river where it crossed said street, — were so pointed out to them, and according to said working plan, without making any objections whatever, and continued said work for a long time thereafter.

5th. And for a fifth and further answer to so much of plaintiffs' complaint as claims additional pay & compensation for making the excavation and laying the pipes under the river where the same crosses Clinton street, defendant says that it was no more difficult or expensive to lay said pipe under the river on said
22 street than it would have been to lay the same under said river wher- the same crosses Calhoun street, and that whatever money was expended by the plaintiffs in laying said pipes under said river on said Clinton street over and above five hundred dollars was the result of carelessness, extravagance, and unskillfulness on the part of the plaintiff and their agents.

Wherefore defendant asks judgment.

6th. And for a sixth and further answer to so much of the third paragraph of plaintiffs' complaint as claims for work done and materials furnished, defendant says that whatever materials were furnished by the plaintiffs or labor performed by them for the defendants the same was furnished and performed under the written contract filed with the complaint, which is hereby referred to and made a part of this answer, and it says that the prices at which all and every part of said service & labor was to be done and materials furnished is fully and specially set forth in the contract filed with the complaint, and this defendant avers that it has fully paid said

plaintiffs the said contract price for all said work and materials; that it is expressly agreed in said contract that no claim for extra work or material furnished shall be made or entertained unless such extra work & materials shall have been done and furnished in
23 obedience to a written order of the city engineer and water-works trustees, and a stipulated price for the same agreed upon.

And it says that no written order was ever made by said engineer and water-works trustee to the plaintiff to do said work or furnish said materials, as set up in said third paragraph.

Wherefore defendant asks judgment.

COLERICK, ZOLLARS & NINDE & ELLISON,
For Def't.

And the plaintiffs are ruled to reply.

And now comes the parties, by counsel, and the plaintiffs by Mess. Coombs, Bell & Norris, their attorneys, and in response to the rule heretofore entered file their reply to 2nd, 3rd, 4th, & 5th paragraphs of said answer, in the words and figures following, to wit:

RICHARD WOOD *et al. vs.* THE CITY OF FORT WAYNE.

The plaintiff, for reply to the second, third, fourth, fifth, paragraphs of the defendant's answer, deny every material allegation therein contained.

COOMBS, BELL & MORRIS,
Atty's for Pl'ffs.

The plaintiffs move the court to strike out the sixth paragraph of the defendant's answer, the same being immaterial and
24 only a denial of the complaint.

COOMBS, BELL & MORRIS,
Pl'ffs' Att'ys.

And the court, having heard the arguments of counsel, doth now overrule the said motion to strike out the sixth paragraph of defendant's answer, and plaintiff- excepts thereto, and the plaintiff- is ruled to reply.

And now come the plaintiffs, by Mess. Coombs, Bell & Morris, their attorneys, and file their answer to said sixth paragraph of defendant's answer, in these words:

RICHARD WOOD *et al. vs.* THE CITY OF FORT WAYNE.

The plaintiffs, for reply to the sixth paragraph of defendant's answer, deny every material allegation therein contained.

COOMBS, BELL & MORRIS,
Att'ys for Pl'ffs.

And this cause is now at issue, and, on plaintiffs' motion, is continued at their costs.

And afterwards, to wit, on the 10th day of June, A. D. 1882, the following further proceedings in said cause were had, to wit:

Come now the parties, by their attorneys, and file their agreement herein that all depositions on filed may be published. And, on motion, it is ordered that all depositions on file herein be published accordingly.

And afterwards, to wit, at the June term, 1882, of said court, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings were had, to wit:

JUNE 10TH, 1882.

Come now the parties, by counsel, and the defendant files her motion and affidavit asking that dedimus issue to take the depositions of J. D. Cook; to which plaintiffs agree, and dedimus is ordered accordingly.

And the defendant now moves to strike out parts of the depositions of William Scully, and also of John W. Rutherford, and also of Charles MacRichie.

And afterwards, to wit, at the June term, 1882, of said court, before the Honorable Walter Q. Gresham, judge as aforesaid, on the 16th day of June, 1882, the following further proceedings in said cause were had, to wit:

Come now the parties, by counsel, and plaintiff- moves to strike out part of the deposition of J. D. Cook, in these words, to wit:

UNITED STATES OF AMERICA, *District of Indiana:*

WOOD *et al. vs.* THE CITY OF FORT WAYNE.

Come now said plaintiffs, and move the court to strike out the following questions and answers in the examination of Joel D. Cook, for the reason that the same are and each of them is irrelevant, incompetent, improper, and immaterial, viz:

Answer No. 28.
Question " 33 and the answer thereto.
" " 60 " " " "

COOMBS, BELL & MORRIS,
Att'ys for Pl'ff.

And this cause being at issue, now comes the following jury to try the same, to wit, Harry C. Hurlbet, Ransom Hubbard, Valentine Berky, Henry Stauffer, B. F. Stephens, William L. Matthews, Mark L. Patterson, Julius T. Speek, Hudson Loring, John Harper, W. H. Corest, and George A. Crowell, twelve good and lawful citizens, resident householders and freeholders of said district, duly elected, tried and sworn to well and truly try the issue herein, and a true verdict render according to the law and the evidence.

And the plaintiffs having introduced part of their evidence, the court instructed the jury, over the objections of the plaintiffs, to return a verdict for the plaintiffs for four thousand and one hundred

dollars; which was accordingly done, in the words and figures following, to wit:

"We, the jury, find for the plaintiffs, and assess their damages at $4,100.

JOHN W. HARPER,
Forema- of the Jury.

27 To which ruling of the court instructing the jury to return said verdict plaintiffs also objected, and filed their bill of exceptions embracing their said objections, duly signed by the court, which reads as follows, to wit:

In the United States Circuit Court.

RICHARD WOOD *et al. vs.* CITY OF FORT WAYNE.

Be it remembered that during the progress of the trial, and while plaintiffs were introducing their evidence-in-chief, the parties agreed that there was due the plaintiffs on the different items in their cause of action, except the items based upon the change in the crossing of St. Mary's river at Clinton street, instead of Calhoun street, the alleged change in the fire-boxes from eight inches in the clear to thirty-six inches in the clear, and the alleged damages caused by the delay in furnishing special castings, and the imperfect condition and finish of such castings, in the sum of ($4,100) forty-one hundred dollars, for which amount the defendant offered to confess judgment in favor of the plaintiff-; that after such agreement of parties, and offer to confess judgment by the defendant in favor of the plaintiffs the court, on the defendant's motion, struck out all the plaintiffs' evidence (except the contract) in support of the three items of the plaintiffs' cause of action above alluded to, and not embraced in said agreement of parties, said three items amounting in the aggregate to five thousand seven hundred and seventy-two dollars. Said evidence stricken out by the court was as follows, to wit:

28 Plaintiffs offered in evidence the contract, marked Exhibit A, a copy of which follows the complaint hereinbefore recorded, which was admitted by the court.

And also offered a copy of the advertisement for proposals as published in the newspapers, in the words and figures following, to wit;

Fort Wayne Water-works.

Notice to contractors.

Sealed proposals will be received by the trustees of water-works of the city of Fort Wayne at their office, in said city, until one o'clock Tuesday, the 9th day of September, 1879, for furnishing cast-iron water pipes, special castings, hydrants, and valves approximately as follows:

4,200	lineal	ft.,	560.73	tons,	24-in.	pipe
3,230	"	"	313.31	"	24 "	"
1,900	"	"	82.65	"	12 "	"
23,050	"	"	576.25	"	8 "	"
82,420	"	"	1,442.35	"	6 "	"
16,780	"	"	145.58	"	4 "	"
Total..... 131,580			3,159.87			

Also 65 tons of special castings, 200 fine hydrants, together with such valves as may be requisite in laying above pipe.

Tender will also be received for pipe laying, setting hydrants and valves, including valve boxes, vaults, and covers.

Blank proposals, specifications, and forms of contract will be furnished by the trustees from and after August 25th, 1879.

29 The trustees reserve the right to reject any or all bids.

CHRISTIAN BOSEKER,
CHARLES McCULLOCH,
HENRY MONNING,
Trustees of Water-works, Fort Wayne.
J. D. COOK, *Toledo, O.,*
Consulting Engineer, Fort Wayne.

In the Circuit Court of the United States for the District of Indiana.

RICHARD WOOD *et al. vs.* CITY OF FORT WAYNE.

Plaintiffs offered in evidence the contract, which is marked "Exhibit A," and read the same.

WILLIARD F. INMAN, being duly sworn, deposed as follows:

My name is Williard F. Inman; I reside in New York; am superintendent of R. D. Wood & Co., the plaintiff-; was present at the bidding for building water-works for defendant as representative of plaintiff- and to make estimates for them. Bidding took place about two days before contract was executed, September 8th or 9th; I made estimate of the construction of the work; Mr. Newhall estimated cost of iron; I also examined the crossing at Calhoun street—
30 always do that. I have been engaged in building water-works twelve years in different places—Burlington, Brandon, Providence. At the time of the building [I] was referred to a map in the civil engineer's office, Brackenridge; also got the specifications, which referred to the map. Mr. Charles McCulloch told me where to find the map; he was one of the water-works trustees.

Witness here showed the map.

Yes, this is the map. This line on this map showing crossing on Clinton street was not on the map at the time it was shown us, or at the time of the bidding, but has been put on since. We bid with reference to this map as it then was. I took streets and everything else in making estimates for map, & to examine nature and character of soil. After I saw map I made examination of crossing at

Calhoun street. I examined the depth of river and found it not over two feet. The day we commenced work, & about four weeks after execution of this contract, we first learned of the change of the crossing to Clinton street. The trustees said it was a shorter line. The line crossed the river about 20 feet west of the iron bridge, and it was 7 feet deep in the middle. I told McCulloch, one of the trustees, that we couldn't cross at Clinton street without additional expense.

JUNE 16TH, 1882—2 o'clock p. m.

31 Direct examination continued by Mr. BELL:

Q. 1. Mr. Inman, I will go back a little in the examination. You may state, at the time you were at the bidding referred to, whether or not you examined any other crossing of the river than the Calhoun street one?

A. No, sir.

Q. 2. You may state, if you please, when you ascertained the depth of the Clinton St. crossing, & the material in the river which the river bed was composed of—what, if anything, you said to the trustees about crossing there?

Obj. by def't.

Q. 3. Mr. Inman, when you ascertained what the depth of water was at the Clinton St. crossing & the character of the river-bed, what, if anything, did you say to the trustees or def't with reference thereto?

Obj. by def't. Overruled for present, & exception by def't at the time.

A. I went immediately, when I found difficulty with the extra depth of water, to the trustees, McCulloch & Monning. Monning was on the work a good deal of the time & knew the character of it, & told them I could not proceed. I did not consider it under my contract.

Obj. by def't. Overruled, & exception by def't at the time.

32 And they said they were willing to do what was fair & right in the matter, & told me to go to Mr. Cook, & I went to Mr. Cook.

Q. 4. By COURT: Who was Cook?

A. The chief engineer. the consulting water-works engineer.

Q. 5. What, if anything, did you say, before *leaving* that conversation with Mr. McCulloch, about refusing to go on unless you had additional pay for it?

Obj. by def't that McCulloch could not act as an individual. Overruled, & exception by def't at the time.

A. I told him that I would go on if he paid me the additional cost, whatever it was, over & above the amount that was allowed at the other place.

Q. 6. What, if anything, did you tell him the additional cost would be?

A. Five hundred dollars we have always estimated it at.

Q. 7. What did he say to you?

A. He said he did not want me to make another claim now, because the council and the water-works' trustees were at swords' points, & "we have hard enough work to get along now." You go on, & whatever it costs we will make up in the end, & the council will be in better humor.

Q. 8. What, if anything, did he advise you to do about seeing Mr. Cook?

A. He did so, & I went to see Mr. Cook.

Q. 9. Where did you go?

33 A. I went to Toledo to see his view of the contract & his construction of the contract.

Q. 10. What did you say about it?

A. I asked him or I told him that we could not proceed with the contract in that difficult place it was in, & we had never considered that change likely, & told him we had had a talk with the trustees, & they had sent me to him. He said he could not answer for them, but considered that we ought to have extra pay, & he should recommend it to the trustees.

Q. 11. Did you come back & see Mr. McCulloch after you saw him?

A. Yes, sir; & told him the conversation I had had with the engineer, & told him that under that ground I should present a writing refusing to go on unless we should get extra pay. I wrote it & gave it to Mr. Eddy to give to him.

Q. 12. You prepared the writing & gave it to Mr. Eddy?

A. I did.

Q. 13. (Handing paper to the witness.) Is this the writing that you refer to?

A. Yes, sir; that is my writing.

Q. 14. Is that the one you refer to as having prepared for the water-works trustees? I see you have addressed that to the

34 water-works committee. Why did you do that?

Obj. by def't.

COURT: He says that is the paper; that is enough; that is not very material; that is the paper. This paper was marked "Exhibit B."

Q. 15. State, if you did, after presenting that claim, go on & put the water-pipe under Clinton street?

A. Yes, sir.

Q. 16. Tell the jury what difficulties, if any, were encountered there?

Obj. by def't.

Q. 17. By the COURT: What did you first do after they told you that they wanted you to cross at Clinton St.? Did you make soundings?

A. We went to making the coffer-dam.

Q. 18. By the COURT: How far did you proceed before you found out the depth of water?

A. We found 7 feet of water.

Q. 19. By the COURT: Who was it that told you that they wanted to cross at Clinton St.?

A. The water-works' trustees; two of them were present, & Mr. Brackenridge, the city engineer.

Q. 20. By the COURT: Who was present on your side?

A. I don't know as any one but me & one of my foremen.

35 Q. 21. By the COURT: What did you say, if anything?

A. I said I supposed we were to cross at Calhoun St. instead of here, & I asked how deep the water was, & Charley Brackenridge said 3 feet deep; I supposed he knew the water.

Q. 22. By the COURT: I thought you said it was 5 feet.

[A.] No; they told me it was 3 feet.

Q. 23. By the COURT: Then, what did you say?

A. They said nothing more.

Q. 24. By the COURT: Then what did you say?

A. I don't remember the conversation; & then we went to work that afternoon.

Q. 25. By the COURT: Then what followed?

A. As soon as we found the depth of the water there we objected.

Q. 26. By the COURT: How long after this before you objected?

A. It might have been a week.

Q. 27. By the COURT: In the meantime what had you done?

A. We made a coffer-dam in the river; I had built the dam before I told them.

Q. 28. By the COURT: How long had you been on the coffer-dam before you told them?

A. A week or 10 days—when I found extra depths.

Q. 29. By the COURT: You don't mean to say that you worked a week or 10 days before you found it was 7 feet deep?

A. We found it was 7 feet deep.

36 Q. 30. By the COURT: What were you doing out there?

A. We were dumping gravel & clay, & making a dam.

Q. 31. By the COURT: You did not know it was 7 feet deep?

A. I knew how deep it was. I went on until I found it was quicksand there.

Q. 32. By the COURT: When they first told you that they wanted you to cross at Clinton St. you did not say anything about that being a violation of the contract?

A. I simply told them I supposed we were to cross at Calhoun St.

Q. 33. By the COURT: What did you say then about objecting?

A. I asked about the depth of the water; that was the first question that came in my mind. If the water was about the same it would not make much difference; but if it was deeper I would make objection.

Q. 34. By the COURT: And then you found quicksand?

A. Yes, sir.

Q. 35. By the COURT: Did you go out to sound the water?

A. No, sir.

Q. 36. By the COURT: How soon did you find the quicksand?

A. As soon as we began to pump?

37 Q. 37. You may tell the court if you could ascertain the depth of the water; if there was a hole there; if you could find the depth of the water until you commenced your coffer-dam?

A. Not unless we had a boat.

Q. 38. By the COURT: Didn't you suppose that the water was 7 feet deep when you commenced your coffer-dam?

A. No, sir; I did not.

Q. 39. By the COURT: Would you commence building a dam without knowing the depth of water?

A. I did that.

Q. 40. Tell the court about the hole—how wide it was.

A. This pier in the bridge—logs coming against it down there would cause an obstruction in the river, & cause the current to dig out a hole in the river. There was where the water was 7 feet deep, & no man could understand it until a man went there & took a sounding.

Q. 41. What did it cost, Mr. Inman, to put the pipe in at Clinton street crossing under the river? I mean just the labor of laying.

A. The entire cost of putting the pipe down was $5,070.00.

Obj. by def't overruled, & exception by def't at the time.

Q. 42. Give the jury & his honor some idea of the difficulty

38 & the means that had to be resorted to to accomplish it there.

A. It is a difficult thing to do.

Q. 43. Do the best you can at it; give them some idea.

A. Unless you are accustomed to handling quicksand it is difficult to understand.

Q. 44. Give them some idea.

A. In the first place we did as the chief engineer, Cook, told us to do.

Q. 45. What was that?

A. To run out a coffer-dam & dump clay there.

Obj. by def't sustained, & exception by pl't'f at the time.

Q. 46. By the COURT: Go on.

A. After building our coffer-dam around there to the center of the river opposite the center pier we got a steam engine & pumped it out.

Q. 47. How long were you engaged in building this coffer-dam, do you think?

A. It was something like 10 days before we were ready to pump it out.

Q. 48. You may tell the jury whether in crossing the stream you attempted to build your coffer-dam across the stream, or one-half at a time?

A. One-half at a time.

Q. 49. To let the water run, when you got that pumped out, how deep did you find the water?

A. Seven feet deep opposite the center pier.

Q. 50. What kind of material did you find at the bottom?

39 A. A very fine quicksand; it came in as we pumped it out. We built our sheet piling 7 feet high.

Q. 51. Tell the jury what you mean by sheet piling.

A. It is tongue & gro-ved plank. This was driven down where the dam was to be. The top of the pipe was to be buried one foot below the bottom of the river. We had a pipe 2 feet in diameter; that makes a trench 3 feet in depth. We drove our sheet piling & commenced to dig a trough & pump out. We had to have a steam-pump to keep the water from coming in faster than we could manage it. We had 2 six-inch centrifugal pumps going night & day, & it forced the water up fast as we could get it out.

Q. 52. How long were you engaged in laying the first half?

A. About 6 weeks.

Q. 53. Do you know how many men you had employed?

A. We had from 25 to 30 men employed all the time; perhaps more some of the time.

Q. 54. Do you mean you were about 6 weeks in getting clear across the river, or half way?

A. Half way.

Q. 55. How did you find the other side of the river?

A. It was worse. We found places that a man could not stand. We could take a shovel & it would go clear out of sight in the quicksand.

40 Q. 56. Well, how long were you engaged in getting across there?

[A.] We were very nearly as long. The 6 weeks included getting part of the sheet piling on the other side until the high water drove us out until spring, when we finished it.

Q. 57. Well, Mr. Inman, you may state now the question I had propounded to you about measurements. You had already given your experience in crossing streams & building water-works?

A. Yes, sir.

Q. 58. You have been engaged in estimating for the purpose of making contracts?

A. Yes, sir.

Q. 59. For about ten years?

A. Yes, sir.

Q. 60. You may state now whether your experience has been such in such matters as to enable you to make an approximately, at least, correct estimate of the cost of going under a stream when you look at it from its banks?

A. Yes, sir.

Q. 61. You may state what, in your opinion, would have been the cost of laying pipes at Calhoun street.

Obj. by def't.

Q. 62. By the COURT: Did you ever examine at Calhoun St. to see if there was quicksand?

A. No, sir.

Q. 63. By the COURT: Do you know that there was quicksand there the same as the other?

41 A. Yes, sir; if I got down that depth; I would not have had to go more than 5 feet there.

BELL: I propose to show that they know from the surrounding ground; this difference arises from the pressure of the water.

Q. 64. By the COURT: I doubt if you will find quicksand everywhere there.

A. We shall expect it.

Q. 65. By the COURT: Do you mean to say, from your knowledge as an expert, that you would find quicksand in any place at the same depth?

A. Yes, sir; I should around there.

Q. 66. By the COURT: For what distance?

A. I should examine everywhere.

Q. 67. By the COURT: Do you mean beyond the city of Ft. Wayne?

A. As far as Ft. Wayne goes. My experience & knowledge show that you will find quicksand in the bed of such streams.

Q. 68. By the COURT: You never examined at the other crossing?

A. No, sir.

Q. 69. I will ask your hypothesis, concluding that you would find quicksand at the depth of 2 feet. What would it cost?

A. It would take $500.00.

Q. 70. No; that is not evidence. What, in your opinion, would it cost?

A. It would cost $500.00 extra.

Q. 71. What do you mean by extra?

A. We get a certain price per foot for laying pipe in dry

42 land, & this is in addition to the cost on dry land, $500.00.

Q. 72. How many feet wide is the river?

A. Two hundred feet wide; we got sixty cents a foot for laying pipes on dry land.

Q. 73. Tell the jury how the difficulties increase, if they do increase, with the increased depth of water where quicksand is found in laying pipe.

A. The increase is very rapid; every 6 inches you go down the difficulty increases fourfold until you reach the point where it is impossible to go any further with all the machinery that can be brought.

Q. 74. By the COURT: What do you mean by fourfold? By what rule do you determine?

A. I cannot say.

Q. 75. By the COURT: Why do you say it, then? There is no rule by which you can say it is fourfold or sixfold? There is no rule?

A. No, sir; it depends upon the under strata under the river.

Q. 76. Taking this river, with such a substrata as that, what is the increase?

A. I don't know that I can figure it.

Q. 77. By the COURT: That is, determine that there is a rule?

A. There is no rule; only my experience that I can give.

BELL: I shall have to differ with the Court & the witness; there is a rule of hydrostatics.

COURT: But that is the rule for water, but this is for sand.

43 BELL: No; I ask what the increased presssure of the water is?

WITNESS: I can't tell just what the increased pressure of water would be; it is a matter of hydrostatics.

Q. 78. If you can tell what the difference in cost would be; if you can form any reasonably approximate idea or opinion what the increase in cost would be between 2 feet of water in such a place as this here & in 7 feet of water, in what ratio, you may tell the jury.

A. Not less than ten times.

Q. 79. Why is that?

A. Because of the increase of depth; every inch you go down increases the pressure outside.

Q. 80. By the COURT: You have put them in both where there was 2 feet and 7 feet both?

A. Yes, sir.

Q. 81. You say that the difference as against 7 feet it would cost 10 times as much. What kind of substrata is there in this locality?

A. A very fine sand.

Q. 82. Well, sir, now leaving that, you may state whether or not you had built the work across there when this demand for extra pay was made in writing.

A. No, sir; I had not.

Q. 83. Do you know about how long before it was built that you made the demand in writing?

A. We made the demand soon after we commenced & found the difficulty. We did not build out until the next July.

44 Q. 84. Oh, yes; you told me you had to quit that winter.

Mr. INMAN: What connection did you have with the building of the work? Did you remain here during the whole time?

A. Yes, sir.

Q. 85. What did you do?

A. I superintended the workmen generally; I superintended the whole work of laying the pipe.

Q. 86. Whom, if anybody, did the city have, Mr. Inman, while you were here, to inspect the condition in which the streets were left?

A. They had two inspectors, Miller & Eiden.

Q. 87. Which Miller?

A. Adam Miller.

Q. 88. The gentleman in the court here now subpœnaed as a witness?

A. Yes, sir.

Q. 89. What time did you stop the laying of the pipes?

A. The 31st day of August.

Q. 90. What year?

A. 1880.

Q. 91. You may state whether or not, Mr. Inman, you left any-

body here after the water was let into the pipes to see to repairing any pipes that needed it or anything of the kind.

Obj. by def't that there is no complaint of any bursted pipes. Overruled, because the pipes were to be kept in repair for 6 months by the contract.

Q. 92. You may state whether you left anybody here to attend to that.

45 A. Yes, sir; we left a man here, Mr. Miller.

Q. 93. You may state whether you ever heard of any bursted pipe that was not replaced.

Obj. by def't.

COURT: He can state whether any complaint was made.

Q. 94. Was there any complaint made of any bursted pipe that was not repaired?

A. No, sir.

Q. 95. Have you ever heard of any complaint that the pipes were not kept in proper repair?

A. I never have.

Q. 96. Tell the jury how you replaced the earth on the streets where those pipes were put in.

A. We filled the ditches up & rounded them up, & when they settled in after the rain we filled them up. In some places they did not settle. We rounded them up a foot, on the average; that depended something on the depth of the trench & the size of the pipe.

Q. 97. Who, if anybody, attended to keeping the streets in repair after the pipes were laid?

A. We kept them in repair.

Q. 98. Whom did you leave here?

A. Adam Miller, & kept him here for 6 months after we finished the laying.

Q. 99. Which would be——

A. The first of March, & he staid here until the first of April.

Q. 100. What year?

A. 1881.

Q. 101. Mr. Inman, you may state what is the proper man-

46 ner, where you cut through a street, say, with Nicholson pavement, as to filling over the trenches—whether to put in the filling-up & put in your pavement at once, or wait until the soil settles.

A. We always wait until it settles.

Q. 102. Why so?

A. Because it will settle.

Q. 103. How long does it require to settle?

A. Certainly through one winter in this kind of soil—clay. It has to be wet thoroughly one winter before it will come back solid.

Q. 104. Were you here when the work was all completed?

A. Yes, sir.

Q. 105. Did you see all the trenches where they were dug & pipes were laid?

A. No, sir.

Q. 106. What ones did you not see?

A. I would be away a day or two.

Q. 107. I mean after they were laid?

A. Yes, sir; I drove all over the city.

Q. 108. You may state whether they were all filled up properly or improperly.

A. I should call them properly filled.

Q. 109. As to the streets where there was Nicholson pavement, were there any streets where you did not put any back?

A. Yes, sir.

Q. 110. Which one?

A. Barr St., Clinton St., & Court St., & there were some parts of one, two, or three streets where we were directed not to.

Q. 111. Directed by whom?

A. By the trustees & the engineer.

47 Q. 112. What reason was given for not putting the blocks back there?

A. Because they were too old & rotten.

Q. 113. What was done toward filling up there?

A. We filled up there, after it was done, with cinders, which really made a better work than the old blocks could have done.

Q. 114. Mr. Inman, I want you to tell the jury as to those valve boxes—what was said & done.

A. The contract calls for certain valve boxes to be bid for according to the plans & drawings; we found no drawings, & asked for them, & they said they were not prepared.

Obj. by def't that the contract is that there shall be no delay; that the contract specifies that they should put all valve-boxes in without extra charges.

BELL: The contract shows the valve boxes shall be filled according to certain specifications; they find no specifications for them, & they ask what kind they want before the bidding, & they are asked what kind they usually put in, & they tell what dimensions, & those are agreed upon, & subsequently there is a change made, that *that* they are to *to* put in a different kind, & they are to be paid for them.

COURT: You had better show that contract.

Q. 115. Whom did you make your arrangements with?

A. We did not agree upon any price.

Q. 116. Very well; what did you do?

48 A. They ordered us to make some boxes that large, over 3 feet at the bottom; I objected to making them that size; I told them I had contracted to make some about 8 inches.

Obj. by def't.

COURT: He says that they never agreed to pay anything extra for them now.

BELL: If they were directed to do it, & they were not such as provided for by the contract, he should be paid for them.

COURT: If he agreed to furnish such boxes & did not demand any pay for it, that settles the question.

BELL: They agreed verbally about the size.

COURT: That is prior to the contract.

INMAN: You cannot insist upon a verbal contract prior to the contract.

Q. 117. Was it prior to the contract?

A. It was about the time we signed the contract.

BELL: I offer to prove that they had a talk with the trustees as to what size. They called the attention of the trustees to the fact that the specifications did not designate the size of the boxes, & the trustees asked them what size was usually put in, & they told them about 8 inches on the inside, & they were directed to go on & use that kind first, & subsequently the trustees directed them to change them.

COURT: You propose to show that that conversation was something controlling the contract?

BELL: The contract being silent.

COURT: I will exclude that.

49 Q. 118. What, if anything, after the contract was made, was said between you & any of the trustees or the engineer as to putting in wooden valve boxes?

A. I objected to making so large a box; I never heard of one so large before.

Q. 119. By the COURT: You agreed to do it?

A. We were ordered to do it.

Q. 120. By the COURT: And did it without saying anything about the expense?

A. I objected to the expense.

Q. 121. By the COURT: You said just now that there was nothing said about the expense.

A. I said that the box would cost 3 or 4 times as much as the other, & we could not put it in at the same price, & we would have to charge $3.00 extra.

Q. 122. By the COURT: What did you say to them about the price?

A. I told them that we never could build that box; we could never agree to it.

Q. 123. By the COURT: What did you mean a moment ago that there was nothing said about it?

A. That was at some other time.

BELL: It is unfortunate; I am afraid that your honor thinks we are trying to do something not right.

COURT: Not at all. The witness says at the time they required him to make those large boxes he said it would cost a great deal more; & the witness interrupted a while ago & said there was nothing said about the price.

50 Q. 124. What did the trustees or engineer say about that, if anything?

A. They objected to paying for them & did not say very much about it, but turned me off & commenced talking about something

else, & continued to order the boxes to be made, & told me we would be paid for them.

Q. 125. What kind of boxes are usually made for this purpose?

Obj. by def't.

Q. 126. By the COURT: What did the engineer require?

A. He required the large one; he did not know what the trustees had agreed.

Q. 127. What had the trustees agreed with you?

A. He had agreed 5 feet 8 inches.

Obj. by def't; ruled out & exception by pl't'f at the time.

Q. 128. Let us come down to the special castings in controversy here; what is a special casting?

A. A special casting in connection with pipe distribution is a T on cross, where the branch is laid to smaller pipes.

Q. 129. What kind of special castings were furnished by the city?

A. Well, we had a good many furnished us that were not the right size; where we should have used a three-way or T, we would use a cross, & block one side, & we would have to make an extra large trench for that joint to be laid.

Q. 130. In order to get before the jury your method of putting in those special castings, suppose you are coming upon Clinton
51 St. to the crossing of Main, & there is a special casting to be put in there, what do you have to do first in the way of preparation for it?

A. We have to dig for the trench on three sides, & put it in as you would any other pipe.

Q. 131. Tell the jury whether you were enabled to put in these crossings & special castings & go on with your work, or whether you were delayed for a time, & if so, when & where?

Obj. by def't that there is a special part of the contract providing that there shall be no extra charge for delay. Contract read.

Q. 132. By the COURT: How long had these castings that were unfit been lying on hand?

A. We commenced as soon as they were delivered; we had our trenches all ready.

Q. 133. By the COURT: They were not fit?

A. No, sir.

Q. 134. By the COURT: What was the use of trying to use them if they were not fit?

A. They were not round; we could not tell it until we got them in.

COURT: I think I will give you the benefit of your exception.

Exception by pl't'f.

BELL: We propose to show that the amount of delay caused by them was on one 20-inch line alone *was* $750.00, as actually estimated, the extra work that had to be performed on that account.

COURT: Let me see that provision again in that contract; I don't want to make any mistake in that point.

BELL: I suppose, your honor, that the city must be held to good faith as well as an individual.

52 COURT: What we mean by good faith is keeping to the contract.

Court read from contract.

BELL: We expect to prove that the special castings were made in the city by the Bass Foundry & Machine Works & delivered along the line, & the parties notified they were there & ready, & we expect to show that they were very defective in essential parts that could not be discovered until they would attempt to fit them.

COURT: This is the provision, & I don't see how it could be different. If these same things had been purchased abroad & shipped down here & been found in this condition, then would you deem, in consequence of having other castings, that you were to have any claim for that damage?

BELL: For the delay.

COURT: What is the difference if they are made at Ft. Wayne?

BELL: What we understand is that the city might have special castings from anywhere, & there might be delay in getting them here; but it don't mean defects in the work.

COURT: They were to inspect them as soon as they arrived, & they were to notify the engineer. I will give you the benefit of the exception on that.

BELL: We also wish to show that they were obliged to chill these pipes on the edges, & that they were too small.

COURT: Ask the question.

53 Q. 135. You may state whether you notified the engineer of the defects & deficiencies of those special castings.

A. Yes, sir; I did.

Q. 136. What did you tell him about it?

A. I told him that we couldn't use them.

Q. 137. What did he do about it?

A. He took them to the Bass foundry & had them rimmed out, & in many cases they had to send them back a second time.

Q. 138. By the COURT: And in what way did this damage result? You mean in your hands.

A. Yes, sir.

Q. 139. What, if anything, did you have to do in the way of using lead & chipping yourselves?

A. We had to chip all the leads off, & then we could not use them, & in one instance we had to make a fire under it.

The obj. was sustained, & exception by pl't'ff at the time.

BELL: We propose to show now the amount of damages resulting.

COURT: You have already done that—$750.00.

Exc. by pl't'f at the time.

Q. 140. I see an item in your bill of $183.89, exchange remittances. What is that, sir?

Obj. by def't. Sustained.

This was all the testimony of this witness.

The pl't'f's next call as a witness in their behalf WILLIAM E. NEWHALL, sworn.

54 Direct examination by Mr. BELL:

Q. 1. What is your name?
[A.] William E. Newhall.
Q. 2. Where do you reside?
A. Philadelphia.
Q. 3. What is your business?
A. I am a traveling & sale agent for R. D. Wood & Co.
Q. 4. What is their business?
A. Manufacturing cast-iron pipe & building water-works.
Q. 5. What had you to do, if anything, with making the contract with Ft. Wayne for building water-works?
A. I was here about the 8th of September, 1879, to make a contract with them, if possible, for the iron pipe & material to be used in the construction in that connection.
Q. 6. What was your part of the business; you came with Mr. Inman?
A. I came with Mr. Inman—at least I was here at the same time that he was; only on the material.
Q. 7. Not as to the laying?
A. No, sir; that is not in my department.
Q. 8. Did you examine as to the locality of the pipes?
A. I did not.
Q. 9. You didn't pay any regard to this map or attend to it?
A. No; I didn't feel it was in my department at all.

55 Q. 10. What, if any, conversation did you have with any of the water-works trustees about the extra work of crossing here at Clinton St. instead of Calhoun St.?

COURT: What is the date of the contract; the 9th of September, 1879?

Q. 11. By the COURT: Now, what do you know, if anything, about any subsequent contract or agreement?
A. I was here the following winter; we had received letters from Mr. Inman to the effect that they had changed.
Q. 12. By the COURT: You came here on letters?
A. I called on Mr. McCulloch, one of the water-works trustees.
Q. 13. When was that?
A. In February, 1880.
Q. 14. By the COURT: Following?
A. Yes, sir; I called on Mr. McCulloch, one of the trustees.

Obj. by def't overruled, & exception by def't at the time.

A. My object was——

Q. 15. By the COURT: It don't matter about your object; state what was said.

A. I brought up the subject of this change in the river crossing.

Q. 16. By the COURT: Had the work already commenced?

A. Yes, sir; I can't state of my own knowledge that it was changed.

Q. 17. By the COURT: Half of the work had been done?

BELL: But not the worst of it. Go on.

A. I brought up the question of the river crossing, and Mr. McCulloch requested me then not to press the question at the pres-
56 ent; he told me that Mr. Inman had already brought that up, & the relations between the trustees & council were not entirely pleasant; they hadn't matters arranged to their satisfaction; it was a new thing, & he would say to me as to Mr. Inman—that he had no doubt in the fact that matters would be arranged & made entirely satisfactory.

Q. 18. Do you know anything more about that?

A. No, sir; except that the end of the work they declined to entertain anything of the kind.

Cross-examination by Mr. ZOLLARS:

Q. 1. Was anybody present when you had this conversation with Mr. McCulloch?

A. I don't remember.

Q. 2. Where was it at?

A. At the bank.

Q. 3. Was there any one else of the trustees present?

A. I don't know.

Q. 4. Mr. Monning, or anybody else?

A. No, sir.

Q. 5. He told you he could not bring it before the trustees, because their relations with the council were not entirely harmonious?

A. Yes, sir.

Q. 6. Didn't he say that the council were complaining that the trustees were assuming too much authority, & that made the trouble?

57 A. He did not tell me.

Q. 7. What did he say?

A. I did not ask it; I did not think it was any of my business.

Q. 8. He simply told me to go on & they would make it right?

A. Yes, sir; he asked me not to press the matter of extra payment for the river crossing at that time.

Q. 9. That is all he said?

A. Except, as I said before, that he had no doubt, when the things were working more smoothly, the matter would be all right.

This was all the testimony of this witness.

The pl't'fs next produced in court to testify in their behalf LYMAN K. EDDY, who, after being duly sworn to tell the truth, the whole truth, & nothing but the truth, in this case, testified as follows:

Direct-examination by Mr. BELL:

Q. 1. Please state your name.
A. Lyman K. Eddy.
Q. 2. Where do you reside?
[A.] White Plains, New York.
Q. 3. What is your business?
A. I am a book-keeper in the employ of R. D. Wood & Co.
58 Q. 4. What connection had you with the building of the Ft. Wayne water-works?
A. I kept the accounts here, looked after the arrival of the pipe, & the distribution of the special castings, & the payment of the force.
Q. 5. What time did you come here?
A. In October, 1878.
Q. 6. How long did you stay?
A. I left in September, 1880.
Q. 7. At the time of the completion of the pipe laying?
A. After the last of the pipe were laid.
Q. 8. There is a paper referred to here; did you go to Mr. McCulloch & serve a paper with reference to the Clinton St. crossing?
A. Yes, sir.
Q. 9. (Hands witness Exhibit B.) Look at that & see if that is the paper?

Obj. by def't. Overruled, & exception by def't then & there.

A. That is the paper.
Q. 10. When & where did you deliver it to him?
A. In the bank.
Q. 11. In his bank at Ft. Wayne?
A. Yes, sir.
Q. 12. Charles McCulloch, who was one of the water-works trustees, in this city?
A. Yes, sir.
Q. 13. When did you deliver it to him?
59 A. My impression is that it was delivered the same day that it was written.
Q. 14. The date here, November 5th, 1879, is the correct date?
A. Yes, sir.
Q. 15. How long was that after the work had been actually begun on the water-works?
A. I was not here at the time the work begun.
Q. 16. Mr. Eddy, what, if anything, did you ever hear any of the water-works trustees say with reference to the work at Clinton street crossing, and any extra payment therefor?

Obj. by def't. Overruled, and exception by defendant at the time.

Before the above question was answered the testimony was interrupted, and this was all the testimony of this witness and the end of the testimony in this case.

And the court declined to allow the plaintiffs to introduce further

testimony in support of their claim for $5,772, based upon the three items in their cause of action, not embraced in the said agreement, on the ground that, notwithstanding the location of the crossing of the St. Mary's at Calhoun street, the defendant had a right under its contract with the plaintiffs to change the place of crossing to Clinton street, as it did, said contract securing to the defend-
60 ant that right, and that the plaintiffs had no right under the contract between the parties to claim anything on account of either of the three items embraced in said agreements of the parties herein.

That thereupon the court instructed the jury to return a verdict for the plaintiffs in the sum of forty-one hundred dollars, the amount agreed upon as aforesaid, and no more; which was accordingly done.

To all of which rulings of the court striking out the plaintiffs' testimony, not allowing them to introduce further testimony, and instructing the jury to return a verdict for the plaintiffs for forty-one hundred dollars, and no more, the plaintiffs at the time, by their counsel, objected and excepted, and pray that this their bill of exceptions be signed by the court and made part of the record, which is now here done this 17th day of June, 1882.

WALTER Q. GRESHAM,
District Judge, etc.

It is therefore considered and ordered, adjudged, and decreed by the court that the plaintiffs do have and recover of and from the defendant the sum of four thousand and one hundred dollars, ($4,100), together with their costs expended herein, with six per cent. interest thereon, to be levied upon the goods, chattels, lands, and tenements of the defendant The City of Fort Wayne.

61 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Indiana, in the seventh circuit, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Richard Wood, Edward R. Wood, George Wood, Walter Wood, and Stuart Wood, partners doing business under the name and style of R. D. Wood and Company, who are all citizens of the State of Pennsylvania, plaintiffs, and The City of Fort Wayne, a corporation created under the laws of Indiana, and a citizen of the State of Indiana, defendants, a manifest error hath happened, to the great damage of the said Richard Wood, Edward R. Wood, George Wood, Walter Wood, and Stuart Wood, partners doing business under the name and style of R. D. Wood and Company, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judg-
62 ment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid,

with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the said United States, at Fort Wayne, Indiana, this 3rd day of September, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and seventh.

[Seal of the United States Circuit Court, Dist. of Ind.]

NOBLE C. BUTLER, *Clerk.*

Allowed by—

———— ————.

63 A copy of this writ filed in the clerk's office of the circuit court of the United States for the district of Indiana, this 8th day of September, A. D. 1883.

[Seal of the United States Circuit Court, Dist of Ind.]

NOBLE C. BUTLER, *Clerk.*

[Endorsed:] Richard Wood, Edward R. Wood, George Wood, Walter Wood, and Stuart Wood, partners doing business under the name and style of R. D. Wood & Company, plaintiffs in error, *vs.* The City of Fort Wayne, defendant in error. Writ of error.

64 The United States of America to The City of Fort Wayne, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Indiana, wherein Richard Wood, Edward R. Wood, George Wood, Walter Wood, and Stuart Wood, partners doing business under the name and style of R. D. Wood and Company, who are all citizens of Pennsylvania, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand, this seventh day of September, anno Domini one thousand eight hundred and eighty-three.

M. R. WAITE,
Chief Justice U. S.

65 STATE OF INDIANA, } *ss:*
Allen County, }

Samuel L. Morris, being duly sworn, on his oath, says: That he served the within citation on Lindley M. Ninde, the attorney of

record of The City of Fort Wayne, the defendant in suit within referred to, this 8th day of September, 1883, by reading the same and delivering a copy thereof to him.

SAMUEL L. MORRIS.

Subscribed & sworn to, this 8th day of September, 1883.

[Seal of Bayless Swift, Notary Public, Fort Wayne, Allen Co., Indiana]

BAYLESS SWIFT,
Notary Public.

66 [Endorsed:] Richard Wood, Edward R. Wood, George Wood, Walter Wood, and Stuart Wood, partners doing business under the name and style of R. D. Wood & Company, pl'ffs in error, *vs.* The City of Fort Wayne, def't in error. Citation.

67 Know all men by these presents that we, Richard Wood, Edward R. Wood, George Wood, Walter Wood, and Stuart Wood, all of the city of Philadelphia, and State of Pennsylvania, and John H. Bass are held and firmly bound unto The City of Fort Wayne (Indiana) in the full and just sum of five hundred dollars, to be paid to the said City of Fort Wayne, its certain attorney, successors, or assigns; to which payment, well and truly to be made, we do bind ourself, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

Sealed with our seals, dated this third day of September, A. D. 1883.

Whereas lately at a circuit court of the United States in and for the district of Indiana, in the seventh circuit, in a suit depending in said court between the said Richard Wood, Edward R. Wood, George Wood, Walter Wood, and Stuart Wood, partners doing business under the name and style of R. D. Wood and Company, who are all citizens of Pennsylvania, plaintiffs, and The City of Fort Wayne, a corporation created under the laws of Indiana, and a citizen of the State of Indiana, defendant, judgment was rendered against the said

68 plaintiffs, Richard Wood, Edward R. Wood, George Wood, Walter Wood, and Stuart Wood, partners doing business under the name and style of R. D. Wood and Company, and the said plaintiffs having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said City of Fort Wayne, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., the second Monday of Obtober next (1883), having been duly issued:

Now, the condition of this obligation is such that if the said Richard Wood, Edward R. Wood, George Wood, Walter Wood, and Stuart Wood, partners doing business under the name and style of R. D. Wood and Company aforesaid, shall prosecute their writ of error to effect, and answer all damages and costs if they fail to make their

plea good, then this obligation to be void; else, to remain in full force and virtue.

RICHARD WOOD.	[SEAL.]
EDWARD R. WOOD.	[SEAL.]
GEORGE WOOD.	[SEAL.]
WALTER WOOD.	[SEAL.]
STUART WOOD.	[SEAL.]
JOHN H. BASS.	[SEAL.]

Sealed and delivered in the presence of—
THOMAS A. PERROTT.
E. H DIFFENBACH.

The word "are," in — line of 1st page, struck out as to Richard Wood, Edward R. Wood, George Wood, Walter Wood, & Stuart Wood.

Approved as a bond for costs, but not to operate as a supersedeas. Sept. 7th, 1883.

M. R. WAITE,
Chief Justice U. S.

A true copy of bond filed this 19th Sept., 1883, in said cause.
NOBLE C. BUTLER, *Clerk.*

69 [Endorsed:] No. 24. Richard Wood, Edward R. Wood, George Wood, Walter Wood, and Stuart Wood, partners doing business under the name and style of R. D. Wood and Co'y, pl'ffs in error, *v.* The City of Fort Wayne, def't in error. Bond sur writ of error to the Supreme Court of the U. S. Filed at Fort Wayne, Sept. 19th, 1883. Noble C. Butler, clerk.

70 UNITED STATES OF AMERICA, *District of Indiana:*

I, Noble C. Butler, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings in the above-entitled cause as fully as the same appears of record in my office.

Witness my hand and the seal of said circuit court, at Fort Wayne, in said district, this 19th day of September, A. D. 1883.

[Seal of the United States Circuit Court, Dist. of Ind.]

NOBLE C. BUTLER, *Clerk.*

[Endorsed:] No. 24. U. S. circuit court, district of Indiana. Wood *et al. vs.* City of Fort Wayne. Transcript.

Endorsed on cover: Indiana. C.C.U.S. No. 291. Richard Wood, Edward R. Wood, George Wood, Walter Wood, and Stuart Wood, partners as R. D. Wood & Company, plaintiffs in error, *vs.* The City of Fort Wayne. Filed 21 September, 1883.

In the Supreme Court of the United States.

Richard Wood et al., *trading as R. D. Wood & Co.*,

vs.

The City of Fort Wayne.

Error to the U. S. Circuit Court for the District of Indiana.

Statement of the Case.

This was an action brought by the plaintiffs in error (who were also the plaintiffs below) to recover from the defendant, the City of Fort Wayne, Indiana, the cost of certain materials and work connected with the furnishing and laying of water pipes for the water works of the city.

In the years 1879 and 1880, the plaintiffs furnished all the water pipes and the work and labor of laying the same for the water supply of the city, defendant. A contract and specifications was executed by the parties on the 10th of September, 1879, which on the part of the defendant was signed by the board of water works trustees who by law were constituted its agents in the matter with full powers to carry through the work to completion. (See *infra* page .) By the terms of the contract and specifications (Record, p. 4), which was duly approved by the city councils, the plaintiffs agreed to furnish all the iron water pipes and appurtenances at prices agreed upon except what are known as "special castings," which were to be supplied by the city from another manufacturer; and they also

agreed to do all the work and labor necessary for laying down the pipes "along the lines and in the streets *as indicated in the "distribution map in the office of the trustees or city engineer* "and in such other streets and places in said city as may be di- "rected." (Record, pages 7, 8.)

Two distinct paragraphs of the contract related to additional compensation for extra work and for change of plan. The first was as follows:—

"And it is hereby agreed, that no claim for extra work shall be "made or entertained unless such extra work shall have been done "in obedience to a written order of the engineer and trustees, and a "stipulated price for same agreed upon whenever such stipulation "may be practicable. When otherwise, such claims to be made to the "trustees in writing within ten days after the completion of such extra "work, or before the payment of the next succeeding monthly estimate "after such work is done, failing to do which, all rights of the contractor "to such extra pay shall be forfeited." (Record, page 13.)

Another clause of the contract, entirely unconnected with the first, provided for the payment of expenses arising from change of plan.

"The said trustees shall have the right to make any alterations in the "extent, dimensions, form or plan of the work contemplated by this con- "tract either before or after the commencement of construction. If such "alterations diminish the quantity of work, the price paid shall be pro- "portionately diminished, and no anticipated profits allowed for the work "omitted. If they increase the work, such actual increase to be paid for "at contract rate for work of its class." (Record, page 13.)

At the time of the bidding for the contract the plaintiffs' superintendent, Willard F. Inman, was shown by the water works trustees a map in the engineer's office, upon which the distribution of the pipes through the streets was marked. By this map, it appeared that the crossing of the St. Mary's river by the main water pipe leading from the pumping works was to be upon the line of Calhoun street, and it was so understood by the parties. The plaintiffs accordingly made their estimates and based their bids upon an examination of the river at Calhoun street, where the water was found to be two feet deep, and the expense of crossing about $500. The contract having been awarded to the plaintiffs, some four weeks after its execution the plaintiffs were informed by the

water works trustees that it had been decided to cross the river at Clinton street instead of Calhoun street, and the crossing upon the line of Clinton street was subsequently marked upon the distribution map. The plaintiffs' superintendent thereupon made an examination of the crossing at Clinton street and found that the river was there seven feet deep. He stated to the water works trustees that the estimates had been based upon a crossing at Calhoun street, where the cost would have been only $500, while the expense at Clinton street owing to the greater depth of the water would be nearly ten times as great, and told them he could not proceed unless the additional cost was paid. The trustees directed him to go on with the work and said that whatever it might cost would be made up at the end. The plaintiffs presented a written notice to the trustees that they would not go on without the extra pay, but being again requested to proceed went on with the work on the Clinton street line, and within two days after its completion sent to the trustees a detailed statement of the additional expense incurred by the crossing at Clinton street.

By the terms of the contract, the plaintiffs were not to supply what are known as "special castings," but these were to be furnished through a manufacturer at Fort Wayne by the city. When received these castings were found to be defective in size and shape, and had to be altered, whereby the plaintiffs were not only delayed in the work, but also were put to extra labor in changing the size of the trenches which had been prepared in advance to conform to the shape of the special castings supplied by the defendant.

The plaintiffs agreed under the contract to furnish wooden valve boxes to be bid for according to plans and drawings; but at the time of bidding, and execution of the contract, no drawings were forthcoming, and the contract was executed by the parties without any express agreement between them as to the size of these boxes. The ordinary and usual size of such boxes being about eight inches in diameter on the inside, the plaintiffs proposed to furnish them of this size, when they were stopped by the trustees and directed to furnish boxes of a size at least three feet in diameter. The plaintiffs' superin-

tendent objected to putting in the larger boxes, and said they would cost three or four times as much as those of the usual size. The trustees ordered the larger boxes to be made, and told him that they would be paid for.

Certain other items of expense were incurred by the plaintiffs in the course of the work by direction of the trustees.

The plaintiffs having completed the work of supplying and laying the water pipes in a satisfactory manner and the same having been accepted and approved by the city authorities, they claimed a certain proportion of the contract price reserved as a guarantee fund, and wrongfully withheld by the city amounting to about $4100; also compensation for the extra expenses to which they had been put by the action of the city, as above stated. The city afterwards admitted its liability to pay the former to the plaintiffs, so that it is not involved in the present controversy.

The defendant refused to pay anything to the plaintiffs on account of the extra expense incurred, the items of which were as follows:—

1. Increase of expense caused by a change of plan directed by the trustees after the contract was executed by which the St. Mary's river was crossed on the line of Clinton street, instead of at Calhoun street, as indicated on the distribution map referred to by the parties when the contract was signed, amounting to	$4,575 00
2. The extra expense caused by the defective character of the special castings furnished by the city and the delay in receiving the same, amounting to	750 00
3. The difference in cost between the wooden valve boxes contracted for, and those of much larger size subsequently ordered by the city, at an extra cost at $3 each, amounting to	447 00
4. Sundry items of expense not included in the contract price and incurred by the plaintiffs by the direction of the city, amounting to	1,118 18

To recover these sums the present action was brought in the Circuit Court of Indiana.

In their complaint (Record, page 2–3), the plaintiffs claimed both under a special count setting forth the facts already mentioned and also by the common counts for work and labor

done and materials furnished, with the bill of particulars containing the items of their claim as above given. (Record, page 16.)

The defendant demurred to the special count of the complaint, which demurrer was overruled by the court after argument. (Record, page 16.)

The answer of the defendant set up *inter alia* in paragraph 6 (Record, page 18), that all the work was done and the materials furnished under the contract which contained a stipulation that no claims for extra work should be entertained unless done in obedience to a written order of the engineer and trustees, which had not been done. This paragraph of the answer the court refused to strike off. (Record, page 19.)

Upon the trial of the case, the plaintiffs produced witnesses who testified to the facts already stated, and were about to introduce further testimony in support of their claims, when the learned judge before whom the case was tried, interposed, and

"*Declined to allow the plaintiffs to introduce further testimony* in support of their claim for $5772, based upon the three items in their cause of action not embraced in the same agreement on the ground that notwithstanding *the location of the crossing of the St. Mary's at Calhoun street*, the defendant had a right under its contract with the plaintiffs to change the place of crossing to Clinton street, as it did, said contract securing to the said defendant that right, and that *the plaintiffs had no right under the contract between the parties to claim anything on account* of either of the three items [not] embraced in said agreements of the parties herein.

"That thereupon the court instructed the jury to return a verdict to the plaintiffs in the sum of $4100, the amount agreed upon as aforesaid (being the guarantee fund admitted to be due by the defendant), and no more; which was accordingly done." (Record, pages 37, 38.)

Also the court, on motion of the defendant, *struck out* all the plaintiffs' evidence already received in the cause (except the contract of September 10th, 1879), in support of the items of additional expense. (Record, page 21.)

The present counsel did not take part in the trial, and their knowledge of the reasons upon which the court below based its action is derived solely from the bill of exceptions.

The ground of the court's ruling is there stated to be, (Record, page 38):—

"That notwithstanding the location of the crossing of the St. Mary's "at Calhoun street, the defendant had a right under its contract to change "the place of crossing to Clinton street, as it did, * * * and that the "plaintiffs had no right, under the contract between the parties, to "claim anything on account of either of the three items."

It is clear that this denial of the plaintiffs' right to recover the items claimed was based solely upon the clause of the contract already cited, providing, "That no claim for extra work "shall be made or entertained unless such extra work shall "have been done in obedience to a *written order* of the engi-"neer and trustees," and that the court below meant to decide that under the terms of the contract, no facts whatever could be put in evidence to excuse the absence of such a written order as a condition precedent to recovery. This view, adopted after the trial had made considerable progress, seems opposed to the former decision of the court, in overruling the defendant's demurrer to the second paragraph of the complaint, in which all the facts were set forth as afterwards testified to, and no written order directing the work was alleged. (Record, page 16.)

The action of the court in declining to permit the plaintiffs to introduce further testimony in support of their claim, and in striking out the testimony already given, was duly excepted to and is now brought to this court for review.

Specifications of Error.

1. The court below erred in interrupting the evidence of the plaintiffs' witnesses and in declining to allow the plaintiffs to introduce further testimony in support of their claim for the additional expense incurred by the plaintiffs in laying pipe across the St. Mary's river at Clinton street instead of at Calhoun street.

2. The court below erred in interrupting the evidence of the plaintiffs and in declining to allow the plaintiffs to introduce further testimony in support of their claim for the extra expense caused by the defective shape of the special castings and the delay in receiving the same.

3. The court below erred in interrupting the evidence of the plaintiffs and in declining to allow the plaintiffs to introduce further testimony in support of their claim for the difference between the cost of the wooden valve boxes contracted for, and those afterwards directed by the defendant to be furnished.

4. The court below erred in interrupting the evidence of plaintiffs and in declining to allow the plaintiffs to introduce further testimony in support of the other items of their claim contained in their bill of particulars.

5. The court below erred in striking out all the plaintiffs' evidence in the cause in support of the claims above-mentioned except the contract, Exhibit A.

6. The court below erred in overruling the motion of plaintiffs to strike out the sixth paragraph of defendant's answer.

7. The court below erred in holding and deciding, that notwithstanding the change of plan in the location of the crossing of the St. Mary's river, the plaintiffs had no right under the contract between the parties, to claim anything on account of the items not embraced in said agreement.

8. The court below erred in instructing the jury to return a verdict for the plaintiffs for $4100 and no more.

9. The court below erred in entering judgment for the plaintiffs in the sum of $4100 and no more.

GEORGE W. BIDDLE.

Argument.

FIRST.

The plaintiffs were entitled under the contract to submit to the jury their claim for the additional expense caused by a change of plan, ordered by the defendant, which fixed the crossing of the river at Clinton street instead of at Calhoun street.

The action of the court below in striking out the plaintiffs' evidence as to this claim, and refusing to permit them to introduce further evidence, was erroneous:—

1st. Because the stipulation of the contract that claims for extra work should not be entertained, unless done in obedience to a written order, had no reference to work done in pursuance of a change of plan, which was governed by an entirely different clause of the contract, by which the water works trustees were authorized to change the plan and it was agreed that extra work performed in consequence of such change should be paid for at contract rates for work of its class; and

2d. Because, even under the assumption of the court below that the case was governed by the clause of the contract requiring a written order of the trustees to authorize extra work, and that a written order other than a change of plan was required, the plaintiffs had a right to introduce evidence (as they had done and were proceeding to do) showing that such written order was dispensed with and waived by the action of the defendant through its authorized agents.

I. By reference to the contract of September 10th, 1879 (Record, page 13), it will be seen that claims for extra work are divided into two classes.

The first class is for extra work not provided for in the contract, for which a written order by the water works trustees is required.

Then, in a subsequent part of the contract, in a clause distinct and separated from the first, it is provided:—

"The said trustees shall have the right to make *any alterations in the "extent, dimensions, form or plan* of the work contemplated by this con- "tract, either before or after the commencement of construction. If "such alterations diminish the quantity of work the price paid shall be "proportionately diminished, and no anticipated profits allowed for the "work omitted. If they increase the work *such actual increase to be paid "for at contract rate for work of its class.*" (Record, page 13.)

It is clear that this clause places claims for additional work done in pursuance of a change of plan upon an entirely different footing from the extra work mentioned in the former clause. No written order specifying what work is to be done is required; a change of plan by the trustees is necessarily an order.

The "extra work" mentioned in the former clause might be unauthorized by the trustees and unnecessary, and a written order was required to protect the city against possible demands of this kind, but as the trustees were authorized to make *a change of plan*, work done in pursuance of such change was necessarily authorized, and no further order than the fact of such change was necessary or exacted in the subsequent clause.

Now the pleadings and evidence in the case, show that the additional cost claimed for crossing the river at Clinton street instead of at Calhoun street was incurred in consequence of a change of plan directed by the trustees after the commencement of the work, and this change was *marked* by them upon the distribution map, and agreed to be paid for by the city under the terms of the contract.

Before the plaintiffs' evidence was interrupted they had already put in evidence the contract which provided (Record, pages 7, 8) that the work should be done "along the lines and in the streets *as indicated on the distribution map in the office of the trustees or city engineer's office.*"

Their superintendent (Inman) had testified that when he was present at the bidding for building the water works he was referred by the water works trustees to the distribution map in the city engineer's office as showing the lines upon which he was to base his estimates (Record, page 22); that in con-

sequence of his inspection of the distribution map he examined the river and made his estimates for a crossing at Calhoun street (Record, pages 22, 23); that the day the work on the river was to begin, the trustees told him that the crossing had been changed to Clinton street (Record, page 23), and directed him to lay the pipes there;* that the map was subsequently marked with a line crossing at Clinton street (Record, page 22); that the increase of cost over the estimate for crossing at Calhoun street was $4575. (Record, page 26.)

Here was a *prima facie* case fully established under the clause relating to change of plan; the change by proper authority and the consequent increase of work and its value, yet the court struck out all this testimony, refused to entertain further evidence to the same effect, and directed a verdict on this item for the defendant:—

"On the ground that notwithstanding *the location of the crossing of "the St. Mary's at Calhoun street*, the defendant had a right under its "contract with the plaintiffs *to change the place of crossing to Clinton "street, as it did* * * * and that the plaintiffs had no right under the "contract between the parties, to claim anything," &c.

It is difficult to see why "the plaintiffs had no right under "the contract to claim anything," when they had proved and were ready to give further proof of the increased cost of the work done by reason of the change of plan.

The court evidently considered that a formal written order explicitly directing the crossing at Clinton street was a necessary condition to any recovery.

This, as already stated, was an unwarranted reading into the clause relating to change of plan of the stipulation for a written order found in the totally different clause relating to extra work *not* connected with a change of plan. The plaintiffs both under the special count of their complaint and under the common counts and bill of particulars were entitled to recover the cost of crossing at Clinton street, if any clause of the contract

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*INMAN'S testimony (Record, page 23). "The day we commenced work, and about four weeks after execution of this contract, we first learned of the change of the crossing to Clinton street.

enabled them to do so, and the court erred in ignoring the clause relating to change of plan (except so far as it authorized the trustees to change the crossing), and in restricting the plaintiffs' right of recovery to the clause for extra work done in obedience to a written order.

A. The plaintiffs' claim under this clause is based first upon the express promise of the city that increase of work shall be "paid for at contract rates for work of its class" when done in pursuance of an alteration of plan directed by the trustees. It is true the trustees had the right to change the plan, but whenever they did so, it was upon express condition that the city should pay for any increase of work occasioned thereby, and it was only upon this consideration that increased work need be performed by the contractor. Moreover, the city accepted the work, and such acceptance of itself is always a sufficient consideration for a promise to pay.

Springfield vs. *Harris*, 107 Mass., 532.

The city cannot escape from its liability to pay for this increased work by saying that it is a new contract between the trustees and the contractors outside of the written contract entered into between the parties. The written contract of September 10th, 1879, with all that it contains, was duly approved by the city councils on September 15th, 1879 (Record, page 14), and with it was also approved and ratified the clause authorizing the trustees to change the plan of the work and agreeing that extra work occasioned thereby should be paid for. It would be a gross fraud to permit a municipality to evade responsibility under such a clause as this on the ground that its agent, who executed the contract, had no authority to bind it.

When the plaintiffs made their estimates and offered their bid in accordance with the plan, *as it then appeared*, they took into account the obstacles and difficulties that might be met with on the lines then laid down, and fixed the price accordingly. But this price was not intended to cover all

changes of plan which the trustees might thereafter choose to direct, by which the expense might be enormously increased.

The contract contains no such unjust stipulation. By its terms " If they (the alterations) increased the work, such actual increase to be paid for at contract rates for work of its class."

Whenever the contract fairly regulates a rate, it would be improper and unnecessary to establish a different rate for the same kind of work caused by an alteration in plan. But this contract does not fix a rate for the work of laying pipes under the river. It would be obviously unfair for the city to alter the plan so as to require the plaintiffs to lay the pipe under the length of the river and then pay per foot only the price for laying under the streets. The contract could not have contemplated so unjust and inequitable a result. It may be that a contract could be so drawn as to require the plaintiffs to submit to such an unjust rule, but no court would willingly arrive at this conclusion, and certainly would not imply such an intention where the terms of the contract were susceptible of another construction. In this case it is not necessary to do so, because the contract requires the city to pay for all increase of work caused by alterations in plan, and the only question is whether a court will say that the price paid per foot for laying several thousands of feet of pipe under streets and along certain lines shall be held to apply to the laying of pipe under the river at a point requiring greatly increased expense over that originally agreed upon.

B. But plaintiffs might have disregarded the express agreement for payment altogether and recovered on their common counts by *indebitatus assumpsit* for the work done.

The trustees were expressly authorized to make alterations in the plan of the work, and alterations made by them were in legal effect made by the city itself.

Where contract work is increased by reason of a *change of plan* directed by the party for whom the work is done, or by one authorized by him to make such change, the contractor

is entitled to recover the value of such work in an action of *indebitatus assumpsit* apart from his remedy under the contract.

Demott vs. *Jones*, 23 How., 220, per WAYNE, J., on page 233;

Demott vs. *Jones*, 2 Wall., 1, 9;

Manufacturing Co. vs. *United States*, 17 Wall, 592.

In Indiana, where the contract was made, it is established that a party to a special contract may recover on a *quantum meruit* for work done outside of it.

Adams vs. *Cosby*, 48 Ind., 153;

Canby vs. *Ingersoll*, 4 Blackford, 493;

Shilling vs. *Templeton*, 66 Ind., 585.

And the plaintiff is entitled to show *to a jury* that this extra work was done.

Dubois vs. *Canal Co.*, 12 Wend., 334.

The change of plan constituted a new contract which the trustees were authorized to make *quoad* the work done in consequence of such change, and the work became a distinct subject not covered by the stipulations of the contract. This case is analogous to that of *Bestor* vs. *The United States*, 3 Nott & Hunt., 425, where a claim of $31,000 was made for extra work on the contract for the construction of the iron steamboat "Ozark." The contract with the Government provided:—

"Any omission in these specifications will not relieve the contractor "from furnishing the objects necessary, nor the material and labor that "may be required for that end, *and for which there are to be no extra "bills presented.*"

While the boat was in course of construction the Secretary of the Navy ordered an apparatus for submarine firing to be applied to the vessel, which indirectly caused the extra work and alterations for which the claim was made.

It was held (per LORING, J.) that the exclusion of extra work by the contract applied only to the vessel described in the contract, and to the details necessary for the construction of that, but did not govern the alterations and additions to the plan fixed by the contract, and the plaintiff was entitled to recover.

Even apart from the direct authority contained in the clause

mentioned, it is probable the trustees could have bound their principals to pay for the extra work performed by their direction.

Under the general law of Indiana governing municipalities, the duties and powers of water works trustees are defined, as follows, in section 3277 of the Revised Statutes of 1881.

"The said trustees shall be authorized to make contracts for the "erection of water works buildings, and construction of settling basins "and other appendages, and the enlargement and repair thereof; for "the purchase of machinery and the manufacture, laying down of pipe; "for the furnishing and supplying with connections of all necessary fire "hydrants for fire department purposes and for keeping the same in "repair; and for all other purposes necessary for the full and efficient "management and construction of the water works; and such contracts "shall be subject to the ratification by the common council."

Under these full powers it might well be argued that the trustees had power to bind the city for extra work, even without a specific authority so to do contained in the contract. Their powers are wider and more comprehensive than those usually conferred upon water and street commissioners, yet it has been held that these latter officials may bind the city for work done in good faith by their direction outside of a written contract.

In *Messenger* vs. *City of Buffalo*, 21 N. Y., 196, the city contracted with the plaintiff to pave a street and furnish sand for that purpose, the work to be performed under the direction of the street commissioner. By the alteration of grade directed by the city it was found that more sand was required to bring the street up to the required grade than the contract specified, and the plaintiff was directed to furnish the extra sand by the street commissioner and other officials. It was held that the plaintiff was entitled to recover for the additional sand thus furnished; said Wright, J.:—

"It is urged that when the plaintiff found that he could not fulfill his "contract in all its particulars, he should have obtained the action of the "common council before commencing or continuing the work. This "could not have been absolutely required to enable him to recover. "The corporation had authorized the street commissioner to make the "contract, and the contract made provided that the work should be "done under the direction of such commissioner. This plainly intended

"that the street commissioner might direct in regard to variations "rendered necessary by the action of the city authorities * * Under "the facts found, I am of the opinion that the plaintiff should have re- "covered. The city must be deemed to have impliedly assented to "the alteration of the contract in respect to the quantity of sand "furnished."

But with the express authority contained in the city's own contract that the trustees may alter the plan of the work, and that extra work done thereby shall be paid for, it is unnecessary further to develop this point.

The right of the plaintiffs, therefore, to recover under this clause of the contract, is based both upon the direct authority given to the trustees to change the plan, in which case an implied agreement to pay the value of the increased work would arise under the authorities cited and also upon the direct promise and agreement of the city to pay for such increased work contained in the same clause.

II. But even assuming for the sake of argument that the case was governed by the preceding clause of the contract (Record, page 13), "that no claim for extra work shall be made or entertained unless done in obedience to a written order of the engineer and trustees," and that the stipulation for a written order, in addition to the change of plan *marked* upon the map, applied to the extra expense caused by crossing at Clinton street, the court clearly erred in excluding and striking out plaintiffs' evidence showing that this stipulation had been dispensed with and waived by the action of defendant's agents.

The evidence already offered by the plaintiffs showed that the water works trustees requested the plaintiffs to make no formal claim for extra work at the Clinton street crossing, and upon the refusal of the latter to go on unless the matter was arranged, told them it would be all right, and insisted upon their proceeding by the Clinton street crossing.

After the change of plan from Calhoun street to Clinton street had been brought to the plaintiffs' notice, the witness Inman testified (Record, pages 23–24):—

"I went immediately when I found the difficulty of the extra depth of "water to see the trustees, McCullough and Monning. Mr. Monning

"was on the work a good deal of the time and knew the character of it. "I told them I could not proceed to do the work under the former con- "tract, and they said they were willing to do what was fair and right in "the matter * * * I told him that I would go on if he paid "me the additional cost, whatever it was, over and above the amount "that was allowed at the other place * * * He said he did "not want me to make another claim now, because the councils and the "water works trustees were at swords' points, and we have hard enough "work to get along now, *You go on and whatever it costs we will make* "*up in the end*, and the councils will be in better humor."

A written protest against crossing at Clinton street without extra pay was also served on the water works trustees. (Record, page 24.)

The witness Eddy was asked the following question (Record, page 37):—

"Q. 16. Mr. Eddy, what if anything did you ever hear any of the water "works trustees say with reference to the work at Clinton street cross- "ing and any extra payment therefor?"

Before the above question was answered the testimony was interrupted and this was all the testimony of this witness and the end of the testimony in this case.

The court then declined to allow the plaintiffs to introduce further testimony in support of their claim (Record, pages 37 and 38), struck out all the testimony already given (Record, page 21), and directed the jury to find against the plaintiffs on this point.

In effect, the court held that nothing that the defendant by its agents could possibly do or say would dispense with the necessity of a written order for the extra work as a prerequisite to recovery. This is so clearly erroneous that it is difficult to imagine the theory upon which the ruling was based.

The authorities are explicit that the performance of any condition of a written contract or of a contract under seal may be waived by parol.

Emerson vs. *Slater*, 22 How., 41;
Canal Co. vs. *Ray*, 101 U. S., 527;
Cummings vs. *Arnold*, 3 Metc., 486;
Monroe vs. *Perkins*, 9 Pick., 298.

And the conduct of one party may dispense with performance by the other without a formal waiver.

As was said by WASHINGTON, J., in *Williams* vs. *Bank*, 2 Pet., 102:—

"If a party to a contract who is entitled to the benefit of a condition "upon the performance of which his responsibility is to arise, dispense "with, or by any act of his own prevent the performance, the opposite "party is excused from proving a strict compliance with the conditions."

In *Swain* vs. *Seamens*, 9 Wall., 254, CLIFFORD, J., said, at page 271:—

"When a person tacitly encourages an act to be done he cannot after- "wards exercise his legal rights in opposition to such consent if his con- "duct or acts of encouragement induced the other party to change his "position so that he will be pecuniarily prejudiced by the assertion of "such adversary claim."

The decisions of this court upon the right of the insured to establish by oral proof the waiver of conditions contained in policies, even where it is stipulated that such waiver must be in writing, are familiar and numerous.

Insurance Co. vs. *Norton*, 96 U. S., 234;
Insurance Co. vs. *Eggleson*, *Ib.*, 572;
Insurance Co. vs. *Doster*, 106 U. S., 35.

In Indiana the law is the same.

Rhodes vs. *Thomas*, 2 Ind., 638;
Bates vs. *De Haven*, 10 Ind., 319;
Billingsly vs. *Stratton*, 11 Ind., 396.

The rule has been applied to conditions of contracts requiring written authority for extra work, similar to the clause in the present contract.

Smith vs. *Gugerty*, 4 Barb. (N. Y.), 614, was the case of a suit under a building contract requiring that extra work should be authorized in writing. Said STRONG, P. J.:—

"It is objected by the plaintiff in error that there was no writing au- "thorizing the extra work as required by the contract. It is true that "there is no positive evidence of the existence of such writing, * * * "and it is fair to presume that there was none. The provision requiring "such writing being favorable to Smith could be waived by him if he "chose to do so. It is not necessary that the waiver should be in writing "in order that it should be effectual (Fleming *vs.* Gilbert, 3 John. Rep., "528; 1 Barb. Sup. C. R., 338). Here the evidence is sufficient to prove "such waiver by Smith. * * * The inference is clear from all this

"that the parties mutually waived the provision requiring a written "memorandum for extra or omitted work."

Grant vs. *U. S.*, 5 Nott & Huntington (Ct. of Cl.), 71. In this case there was a contract between claimants and Government for the erection of a fire-proof structure; the claimants to furnish all materials and perform all the labor; and

"No allowance will be made for extra work whatever unless the cost "of the same previous to execution is agreed upon *in writing* between "the parties to the contract."

The claim was for a quantity of extra materials and labor, but *no writing* was alleged, and the consent of the Government was only implied from the permitting of the work to be done without objection.

MILLIGAN, J. (page 81), after citing Parsons, section 541, and Mumford *vs.* Brown, 6 Cowan, 476, said:—

"It cannot be denied on the proof in this record that the changes "made in the original plans and specifications, necessarily involved, in "many instances, an increase both of labor and cost of materials which "was known to General Crosman, the Government agent, yet he stood "by and daily witnessed their completion without objection, and if not "in terms assenting to them, impliedly authorizing their completion. "* * But in this case the record demonstrates beyond all question that "extra work was performed and extra materials furnished * * which "the United States had accepted and appropriated without just compen-"sation.

"Under this state of facts, and dealing with this case as a transaction "between individuals, there can be no doubt that the claimants could "recover the *quantum meruit.*"

If it be objected that it does not appear from the evidence that all the water works trustees waived the condition requiring a written order for extra work, it is answered that it appears that two of the three trustees, or a majority of them, viz., Messrs. McCullough and Monning, were present when the plaintiffs' superintendent refused to proceed with the work and was directed to proceed (Record, page 23); and although Mr. McCullough seems to have been the spokesman upon that occasion, it would also seem from the testimony that his colleague, Monning, was present and assented. A majority of persons authorized by law to do an act of a public nature must generally concur, but unless required by the law constituting them,

or unless such is the practice, they need not act as a board, and be convened or notified to be convened as such.

Wolcott vs. *Wolcott*, 19 Vt., 37, 39;
Jefferson County vs. *Slagle*, 66 Penna. St., 202.

There is nothing in the statutes of Indiana constituting the water works trustees which requires them to convene and act as a board before taking action in regard to contracts, &c., and indeed from the nature of the duties to be performed by such officials who are required to be constantly upon the ground, directing and overseeing the work, it is simply impossible that every act done by them should require a formal concurrence by vote of a majority of the trustees acting as a board.

But this point is quite unimportant in view of the fact that the last question asked of the witness, Eddy, before the court interrupted the testimony, was (Record, page 37):—

"Q. Mr. Eddy, what, if anything, did you ever hear any of the water "works trustees say with reference to the work at Clinton street crossing, "and any extra payment therefor?

"(Objection by defendant. Overruled, and exception by defendant at "the time.)

"Before the above question was answered the testimony was inter- "rupted, and this was all the testimony of this witness, and the end of "the testimony in this case.

"And the court declined to allow the plaintiffs to introduce further "testimony in support of their claim, &c."

It must be presumed for the purpose of this case that if the question had been answered, it would have been shown that all the trustees directed the extra work, and waived the stipulation as to a written order.

The ruling of the court in interrupting the testimony must have been based solely upon the assumption that a verbal waiver by ALL the trustees could not dispense with a written order, and indeed the question of the authority of the trustees to bind the city for the matters contained in the plaintiffs' claim, is not raised or alluded to throughout the entire bill of exceptions.

It is submitted, under the authorities, that the action of the court below in refusing to receive proof that the condition of the contract requiring written authority for extra work done had been dispensed with, cannot be sustained.

SECOND.

The plaintiffs were entitled to submit to the jury their claim for the extra expense caused by the defective shape and size of the special castings furnished by the defendant.

It appears from the contract and the testimony offered that the plaintiffs were not to furnish what are known as "special castings," but these were to be supplied by the defendant from a manufacturer at Fort Wayne.

The defects in shape of these castings, which were the T's or crosses connecting the main with the smaller pipes, was testified to by the witness Inman (Record, pages 33, 34), and the expense caused by the delay in consequence, and extra work required was fixed by him at $750.

The court struck out this claim as it did the first, and refused to entertain further evidence upon it.

It is true that a clause of the contract provides (Record, page 8):—

> "All pipes, special castings, &c., will be furnished to the contractor "in the city pipe yard or on the cars upon which they are received from "the foundry. They will be delivered to him as soon as received, and "it shall be his duty to notify the engineer of any defects or breakage be- "fore removal from the cars, otherwise all damage arising from such "cause shall be made good by said contractor. The contractor shall "have no claim upon the city for any delay in the delivery of pipes or "other materials from the manufacturers."

No claim is made by the plaintiffs for *delay in the delivery* of the castings, but for the delay and extra work caused by the city itself through the defective shape of the castings furnished. And it was in evidence that the defect was one which could not be discovered until after the castings were delivered and it was attempted to fit them in the trenches prepared for them; then the engineer was duly notified of the defect in shape and size. (Record, page 33, 34.) As the castings were made for the city in Fort Wayne and were delivered along the line, not in cars, the clause providing that the engineer shall be notified of defects or breakage before re-

moval from the cars has no application; nor would it have to any case where the defect could not be discovered before removal. The city cannot take advantage of its own default by refusing to pay for work caused by its own act.

Messenger vs. *Buffalo, 21 N. Y., 196, ut supra.*

As under the first head of the argument, the stipulation for a written order to authorize extra work was waived and dispensed with by the act of the city itself.

THIRD.

The plaintiffs were entitled to submit to the jury their claim for the differenee in cost between the valve boxes originally agreed upon, and those subsequently ordered by the defendant.

This point is very clear.

There is no provision in the contract relating to the size or cost of the valve boxes, and where a contract is silent the ordinary and usual dimensions and costs are presumed.

Wharton on Evidence, Section 969;

Heald vs. *Cooper*, 8 Me., 32;

Now it was testified by Mr. Inman (Record, page 31) that after the contract was executed, the trustees ordered boxes more than four times the usual size, and costing three dollars more each, and upon objection being made said they should be paid for. (Record, page 33.) This was a clear change of plan, and all that has been said on the former claims applies *a fortiori* here.

The other items contained in plaintiffs' bill of particulars are not mentioned in the bill of exceptions.

It is fully admitted that those who contract with municipalities should be held to a strict performance of their duty, but it is submitted that contracts of this kind should not be so construed as to entrap contractors into expense and labor without compensation.

GEORGE W. BIDDLE,
For Plaintiffs in Error.

119-312

SUPREME COURT U. S.
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IN THE

SUPEME COURT

OF THE

UNITED STATES.

RICHARD D. WOOD,
EDWARD R. WOOD,
GEORGE WOOD,
WALTER WOOD AND
STEWART WOOD.
VS
THE CITY OF FORT WAYNE.

In Error to the Circuit Court of the United States for the District of Indiana.

No. 291.

BRIEF OF DEFENDANT.

L. M. NINDE,
Attorney for Defendant.

FORT WAYNE, INDIANA.

1886.

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No. 291.

BRIEF OF DEFENDANT.

The plaintiffs in error sued defendant in the court below to recover a balance they claimed to be due on a contract for the construction of the defendant's water works. The contract covers ten pages of the printed record, from page 4 to 14, inclusive. It contains a stipulation on page 12 that fifteen per cent. of the contract price should be retained by the city until the termination of the contract, as security for its performance. The parties agreed, upon the trial, that there was $4,100 of this reserved per centage at that time due the plaintiffs, and thereupon the Court rendered judgment for that sum, and struck out all the

other testimony of the plaintiffs, except the contract sued on, and said agreement.

Besides this $4,100, the suit was brought to recover for three items of extras: one for extra expense for crossing the St. Marys river on Clinton street, instead of on Calhoun street; one for a change in the fire-boxes from eight inches to thirty-six inches in the clear, and one for damages caused by the alleged delay in furnishing special castings, and for their imperfect condition. See page 21, printed record.

The questions in this Court arise upon the ruling of the Circuit Court in striking out the plaintiffs' testimony tending to establish the three items of damages for crossing the river on Clinton street, and for the alleged change in the fire-boxes and for the delay in purchasing the special castings by the city. The correctness of this ruling as to each of these items of damage depends upon the same principle. If it is correct as to one item, it is correct as to all.

First.—As to the change in the crossing of the river. The contract contains the following provisions:

Printed Rec., page 6. The delivering of the pipe shall commence on or before the 1st day of October, 1879, and be continued with regularity until the completion of the contract, which shall be on or before the 1st day of June, 1880. Special castings shall be delivered, as may be required, by the engineer.

Page 7. Pipe laying shall consist in excavating and refilling trenches; in taking up and replacing pavements or other surface; in hauling and laying pipes, setting special castings, stop-cocks, air-cocks, check-valves, hydrants and all other appurtenances incident to the pipe distribution; in cutting pipes, making joints, *preparing foundations*, build-

ing brick or stone vaults, blow-off wells; in repairing damages caused to gas-pipes, sewers, drains and cisterns; in cleaning the streets and grounds of all rubbish or refuse caused by the above works; in furnishing lead and gasket for joints, fuel for metling lead, clay and rope for bands, blocks and wedges for use under pipes, wrought iron straps for securing caps, reducers, and other parts liable to draw; in furnishing and setting or constructing boxes or vaults for stop-cocks, air-cocks, man-holes, including furnishing and putting cast iron frames and covers thereto; in furnishing sand and other materials for masonry and all *tools and labor necessary for the complete fulfillment of this contract.*

Pages 7 and 8. The above work to be done in the city of Fort Wayne, Indiana, along the lines and in the streets, as indicated on the maps in the office of the trustees or city engineer's office, *and in such other streets and places in said city as may be directed.* The trenches for pipes shall be opened in accordance with the *lines and grades as given or directed by the engineer.* * * * All pipes, special castings, stop-cocks, air-cocks, check-valves and hydrants will be furnished to the contractor in the city pipe-yard, or on the cars upon which they are received from the foundry. They will be delivered to him as soon as received, and *it shall be his duty to notify the engineer of any defects or breakage* before removal from the cars, otherwise all damage arising from such cause shall be made good by said contractor. *The contractor shall have no claim upon the city for any delay in the delivery of pipes or other material from the manufacturers.*

Pages 11 and 12. And the said party of the second part hereby agrees to receive, and the said first party hereby agrees to pay, the following prices as full compensation for the work contemplated in this contract.

(1) For laying the pipes and all special castings appertaining thereto, setting check-valves, stop-cocks and air-cocks, including the excavation and refiling of trenches; *all bailing,* and *shoring,* and ramming; the taking up and replacing paving or other surface of the streets, the removal of all rejected surplus material from the ground or streets; the repairing of damage caused to gas pipes, sewers, drains, streets, cisterns, etc., and the expense of avoiding such obstructions; the hauling of all pipes and other castings and appurtenances onto the grounds and returning those not used to the pipe yards; the furnishing of all blocks

and wedges, and all materials for making the joints, the cutting of pipes, and all other expenses of *material, tools and labor required* by the *specifications and incident to this particular work;* the length to be measured along the center of the pipe, and in case of branches as starting from the center of the main pipe. Twenty-four inch pipe the sum of sixty cents per lineal foot.

Then follows the specific price for every kind of work provided for in the contract.

Page 13. And it is hereby agreed that no claim for extra work shall be made or entertained unless such extra work shall have been done in obedience to a written order of the engineer and trustees and a stipulated price for the same agreed upon, whenever such stipulation may be practicable. When otherwise, such claims to be made to the trustees in writing within ten days after completion of such extra work, or before the payment of the next succeeding monthly estimate after such work is done, failing to do which all right of the contractor to such extra pay will be forfeited. * * * The said trustees shall have the right to make any alterations in the extent, dimensions, form or plan of the work contemplated by this contract, either before or after, the commencement of construction. If such alterations diminish the quantity of work the price paid shall be portionably diminished, and no anticipated profits allowed for the work omitted, If they increase the work such actual increase to be paid for at contract rate for work of its class. All loss or damages arising out of the nature of the work aforesaid, or from the actions of the elements, *or from any unforseen obstructions,* or any difficulties that may be encountered in the prosecution of the same, also for all expenses which may be incurred in consequence of the temporary suspension of any part of said work, shall be incurred by the contractor without extra charge to said city.

By the stipulations of the contract the price to be paid for the pipe was $32 per ton.

FIRST: Was the change in crossing the river from Calhoun street to Clinton street such a change "in the plan of the work," as the city had a right to make under the reservations in this contract?

This question is to be determined largely by the construction to be given to the contract. Conceding, for the argument, that at the time this contract was entered into, there was a "distribution map in the office of the trustees or city engineer's office" indicating "the lines and streets" on which the pipes were to be laid, had the city the right to change these lines and streets, and direct other "lines and streets" on which the pipes should be laid? It will be noticed that no exception is made for crossing the river. The obligation to lay the pipe across the river is contracted for as a part of the general undertaking. The city contracted for the same right to change the street upon which the pipe should be laid across the river as it did to change the location of the line of pipe anywhere else.

One of the specifications is in these terms: "Also in trenches, laying pipes and special casting, including back filling, setting valves, constructing and setting valve-boxes, vaults and covers, and setting hydrants, including all crossings of rivers and canals." Printed Rec., p. 4.

"PIPE LAYING

will consist in excavating and refilling trenches, in taking up and replacing pavements or other surfaces, in hauling and laying pipes, setting special castings," etc. Rec., p. 7.

"The trenches for the pipes shall be opened in accordance with *lines* and *grades* as *given* or *directed* by the engineer."

"The said trustees shall have the right to make any alterations in the extent, dimensions, form or plan of the work contemplated by this contract, either before or after the commencement of construction," and the price per

lineal foot of pipe laying was to be increased or diminished as said lines so "given or directed" by the engineer were longer or shorter than those on the original plan.

By the next clause all loss or damage arising out of the nature of the work from the action of the elements or from unforseen obstructions or from any difficulty that might be encountered in the prosecution of the work, were to "be incurred by the contractor without extra charge to the city."

These provisions are all expressly inserted in the contract for the protection of the city, and the plaintiffs, for the price contracted for, agreed to them. The right to alter the "plan," or "form" or "dimensions" of the work, I submit covers the whole question.

The same right is exercised by the city when its engineer directs the contractor upon what "lines" he shall "open trench for the pipes." The right to alter the "plan" is a right to alter the "plat." The "plan" the city reserved the right to alter was "the representation" of work "drawn on paper" on the draft, or sketch, or plat. These stipulations were necessary to enable the city to perfect a system, and adjust it to the wants of the public, and I submit, there is no reason why they should be disregarded. There are no provisions in the contract conflicting with these stipulations reserving the right to the city to make the changes in the plan complained of. This is conceded by the plaintiffs in error, and they sue for extra work and material, and not upon the contract which can only be sustained upon the theory that the contract does not cover this part of the "plan" or "dimensions" of

the system of water works, and that all the foregoing provisions securing the city in the right to make changes and to direct where the trenches should be opened for pipes are inapplicable. It was not denied below, and perhaps will not be in this court, that the above stipulations secured to the city the right to change the plan and the lines of the pipe in the streets generally. If they do not reserve that right to the city they are without meaning, and can have no effect upon the construction of the contract. There is no other subject matter to which they relate or upon which they can operate. The right to change the line of pipe from one street indicated on the plan as shown at the time of the contract, to an adjoining street, was a valuable right to the city, and of no apparent detriment to the contractor. There were strong reasons on the part of the city why the further investigation of its officers into the wants of the public, and their increased experience, and judgment should be made available in the location of pipes, and as to the streets that should be supplied, and neither the contract nor the record discloses any objections on the part of the contractors at the time the contract was made. If their rights to make changes existed as to the streets generally, why are they not applicable to the street on which the pipe crossed the river?

If the plan, as drawn at the time the contract was entered into, fixed the line of pipe on Calhoun street where it crossed the river, that plan, by the terms of the contract, was liable to change unless it can be maintained that at that point the plan was unalterable, while at every other point and in every respect it was plastic and liable to be changed. Such a construction without a word in the con-

tract to indicate any such intention of the parties would be impossible.

There are provisions in the contract incompatible with the idea that the pipe under the river is an exception.

On p. 4, pipe laying expressly includes "all crossings of rivers and canals."

And on p. 11 the stipulation that fixes the price for laying pipe declares the price shall cover the excavation and filling of trenches, and all bailing and shoring."

The Court below struck out the testimony in reference to the change of location in crossing the river, and refused to allow the plaintiff to introduce any other testimony of a similar character.

Willard F. Inman being duly sworn, deposed as follows:

I reside in New York; am superintendent of R. D. Wood & Co., the plaintiffs; was present at the bidding for building water works for defendant as representative of plaintiffs, and to make estimates for them; bidding took place about two days before contract was executed September 8th or 9th; I made estimate of the construction of the work; Mr. Newhall estimated cost of iron; I also examined crossing at Calhoun street—always do that; I have been engaged in building water works twelve years in different places—Burlington, Brandon, Providence; at the time of the building I was referred to a map in the civil engineer's office—Brackenridge; also got the specifications which referred to the map; Mr. Charles McCulloch told me where to find the map—he was one of the water works trustees. (Witness was here shown the map.) Yes; this is the map. The line on this map showing crossing on Clinton street was not on the map at the time it was shown to us, or at the time of the bidding, but has been put on since; we bid with reference to this map as it then was; I took streets and everything else in making estimates for map, and to examine nature of soil; after I

saw map I made examination of crossing at Calhoun street; I examined depth of river and found it not over two feet; the day we commenced work and about four weeks after execution of this contract, we first learned of the change of the crossing to Clinton street; the trustees said it was a shorter line; the line crossed the river about twenty feet west of the iron bridge, and it was seven feet deep in the middle; I told McCulloch, one of the trustees, that we couldn't cross at Clinton street without additional expense.

DIRECT EXAMINATION CONTINUED BY MR. BELL.

Question 1. Mr. Inman, I will go back a little in the examination. You may state at the time you were at the bidding referred to, whether or not you examined any other crossing of the river than the Calhoun street one.

Answer. No, sir.

Ques. 2. You may state, if you please, when you ascertained the depth of the Clinton street crossing, and the material in the river which the river-bed was composed of, what, if anything, you said to the trustees about crossing there?

(Objected by defendant.)

Ques. 3 Mr. Inman, when you ascertained what the depth of the water was at the Clinton street crossing, and the character of the river bed, what, if anything, did you say to the trustees or defendant, with reference thereto?

(Objected by defendant; overruled for present, and exception at the time.)

Ans. I went immediately when I found difficulty with the extra depth of water, to the trustees—McCulloch and Monning; Monning was on the works a good deal of the time, and knew the character of it, and told them I could not proceed; I did not consider it under my contract. (Objected by defendant. Overruled, and exception by defendant at the time.) And they said they were willing to do what was fair and right in the matter, and told me to go to Mr. Cook, and I went to Mr. Cook.

Ques. 4. BY THE COURT: Who was Cook?

Ans. The chief engineer; the consulting water works engineer.

Ques. 5. What, if anything, did you say to him before having that

conversation with Mr. McCulloch about refusing to go on unless you had additional pay for it?

(Objected by defendant that McCulloch could not act as an individual. Overruled and exception by defendant at the time.)

A. I told him that I would go on if he paid me the additional cost, whatever it was, over and above the amount that was allowed at the other place.

Ques. 6. What, if anything, did you tell him the additional cost would be?

Ans. Five hundred dollars we have always estimated it at.

Ques. 7. What did he say to you?

Ans. He said he did not want me to make another claim now, because the council and the water works trustees were at swords points, and we have hard enough work to get along now. You go on, and whatever it costs we will make up in the end, and the council will be in better humor.

Ques. 8. What, if anything, did he advise you to do about seeking Mr. Cook?

Ans. He did so, and I went to see Mr. Cook.

Ques. 9. Where did you go?

Ans. I went to Toledo to see his view of the contract, and his construction of the contract.

Ques. 10. What did he say about it?

Ans. I asked him; or I told him that we could not proceed with the contract in that difficult place it was in, and we had never considered that change likely, and told him we had had a talk with the trustees, and they had sent me to him. He said he could not answer for them, but considered that we ought to have extra pay, and he should recommend it to the trustees.

Ques. 11. Did you go back and see Mr. McCulloch after you saw him?

Ans. Yes, sir; and told him the conversation I had with the engineer, and told him that under that ground I should present a writing refusing to go on unless we should get extra pay; I wrote it and gave it to Mr. Eddy to give to him.

Ques. 12. You prepared the writing and gave it to Mr. Eddy?

Ans. I did.

Ques. 13. [Handing paper to the witness] Is this the writing that you refer to?

Ans. Yes, sir; that is my writing.

Ques. 14. Is that the one you refer to as having prepared for the water works trustees? I see that you have addressed that to the water works committee; why did you do that?

(Objected by defendant.)

THE COURT: He says that is the paper, That is enough. That is not very material—that is the paper.

(This paper was marked Exhibit "B.")

Ques. 15. State if you did after presenting that claim go and put the water pipe under Clinton street?

Ans. Yes, sir.

Ques. 16. Tell the jury what difficulty, if any, were encountered there?

(Objected by defendant.)

Ques. 17. BY THE COURT: What did you first do after they told you that they wanted you to cross at Clinton street? Did you make soundings?

Ans. We went to making the coffer-dam.

Ques. 18. BY THE COURT: How far did you proceed before you found out the depth of water?

Ans. We found seven feet of water?

Ques. 19. BY THE COURT: Who was it that told you that they wanted you to cross at Clinton street?

Ans. The water works trustees; two of them were present and Mr. Brackenridge, the city engineer.

Ques. 20. BY THE COURT: Who were present on your side?

Ans. I don't know as any one but me and one of my foremen.

Ques. 21. BY THE COURT: What did you say, if anything?

Ans. I said I supposed we were to cross at Calhoun street instead of here; and I asked how deep the water was, and Charley Brackenridge said three feet deep; I supposed he knew the water?

Ques. 22. BY THE COURT: I thought you said it was six feet?

Ans. No; they told me it was three feet?

Ques. 23. By the Court: Then what did you say?

Ans. They said nothing more.

Ques. 24. By the Court: Then what did you say?

Ans. I don't remember the conversation, and then we went to work that afternoon.

Ques. 25. Then what followed?

Ans. As soon as we found the depth of water there we objected.

Ques. 26. By the Court: How long after this before you objected?

Ans. It might have been a week.

Ques. 27. By the Court: In the meantime what had you done?

Ans. We made a coffer-dam in the river; I had built the dam before I told them.

Ques. 28. By the Court: How long had you been on the coffer-dam before you told them?

Ans. A week or ten days—when I found extra depth.

Ques. 29. By the Court: You don't mean to say that you worked a week or ten days before you found it was seven feet deep?

Ans. We found it was seven feet deep?

Ques. 30. By the Court: What were you doing out there?

Ans. We were dumping gravel and clay and making a dam.

Ques. 31. By the Court: You did not know it was seven feet deep?

Ans. I knew how deep it was; I went on until I found it was quick-sand there.

Ques. 32. By the Court: When they first told you that they wanted you to cross at Clinton street, you did not say anything about that being a violation of the contract?

Ans. I simply told them I supposed we were to cross at Calhoun street.

Ques. 33. By the Court: What did you say then about objecting?

Ans. I asked about the depth of the water; that was the first question that came to my mind; if the water was about the same it would not make much difference; but if it was deeper I would make objection.

Ques. 34. By the Court: And then you found quick-sand?

Ans. Yes, sir.

Ques. 35. By the Court: Did you go out to sound the water?

Ans. No, sir.

Ques. 36. BY THE COURT: How soon did you find the quick-sand?

Ans. As soon as we began to pump.

Ques. 37. You may tell the Court if you could ascertain the depth of the water if there was a hole there if you could find the depth of the water until you commenced your coffer-dam?

Ans. Not unless we had a boat.

Ques. 38. BY THE COURT: Did you suppose that the water was seven feet deep when you commenced your coffer-dam?

Ans. No, sir; I did not.

Ques. 39. BY THE COURT: Would you commence building a dam without knowing the depth of the water?

Ans. I did.

Ques. 40. Tell the Court about the hole; how wide it was?

Ans. This pier in the bridge; logs coming down there would cause an obstruction in the river, and cause the current to dig out a hole in the river; there was where the water was seven feet deep, and no man could understand until a man went there, and took a sounding.

Ques. 41. What did it cost, Mr. Inman, to put the pipe in at Clinton street crossing under the river; I mean just the labor of laying?

Ans. The entire cost of putting the pipe down was $5,070. See printed Rec., pp 23 to 26 inclusive.

Then follows a full statement by the witness, of the difficulties and expenses incurred in laying the pipes across the river at Clinton street.

The foregoing extract from the record shows the full force of the plaintiffs' claim to recover the damages for extra labor in laying the pipe under the river at the Clinton street crossing. If my foregoing analysis of the contract is correct, and if the proposition is true that under the terms of the contract the city had the right to change the plan of the work, and that the place of crossing the river was part of the "plan" of the work, then the

plaintiffs must rest their right to recover on the promises obtained as testified to by Mr. Inman.

I suggest there are two fatal objections to their right to recover on the strength of these subsequent promises.

First.—The city had the right to require the plaintiffs to cross at Clinton street, and any promises, even if authoritatively made by the proper officials of the city, would be without consideration and void.

Second.—Neither the chief engineer nor Charles McCulloch, as a member of the board of water works trustees, had any authority to make said promises.

If the plaintiffs were bound to cross the river at Clinton street, then any promises of the city, or its officers, to procure them to make the crossing are void for the want of consideration.

The city, by the contract, had acquired the right to require the plaintiffs to cross the river at Clinton street, and all that the new promise secured to her was the performance by the plaintiffs of the duty thus fixed upon them by their contract. The city has nothing, whatever, for the new promises.

In *Pollock's Principles of Contracts*, p. 161, the rule is thus stated: "For the same reason neither the promise to do a thing, nor the actual doing of it, will be a good consideration if it is a thing which the party is already bound to do, either by the general law or by subsisting contract with the other party. It is obvious that an express promise by A to B, to do something which B can already call on him to do, can (at any rate in contempla-

tion of law) produce no fresh advantage to B or detriment to A."

In *Crosby vs. Wood*, 6 N. Y., 373, one Nathaniel Crosby held possession of a certain paper discharging a certain judgment of Wood against him. The paper was held by Crosby under circumstances that legally entitled Wood to have it delivered back to him, but Crosby refusing to re-deliver it, Wood agreed in consideration of the re-delivery of the paper to him, to allow two mortgages, which bore date subsequent to his judgment, to be prior liens thereto. The question was whether the delivery of the paper by Crosby to Wood, which Wood had the legal right to possess, was a good consideration for Wood's agreement to waive the priority of the lien of his judgment. The Court of Appeals say: "The use of the discharge of the old judgment was, therefore, a fraud on the part of N. Crosby even in respect to the mortgage to the loan commissioners and the retention of the discharge by N. Crosby was one continuing wrong. A court of equity would, as against N. Crosby, at any time have ordered it to be delivered up to Wood, or the Supreme Court would, on motion, have ordered the clerk not to enter satisfaction on the record. Under these circumstances, if Wood, upon the full consideration of the surrender to him, by N. Crosby, of the satisfaction piece had undertaken with him that the mortgage to the Crosbys should be preferred to his judgment, a court of equity would not have enforced that executory agreement in favor of the holders of the mortgage. The surrender of a paper, the retaining of which was unlawful, which a court of equity would have ordered to be delivered up, is not such a consideration as will support an executory contract."

In *Reynolds vs. Nugent*, 25 Ind., 328, the plaintiff agreed for $100 to enter the military service of the United States, to the credit of Tobin township, and the agent of the township accompanied him to the mustering officer, where the plaintiff was offered $350, and refused to be mustered in unless the agent would agree that Tobin township would give him $350 which was agreed to. Held that this last agreement was without consideration as the township received nothing but what the first contract entitled it to.

The following authorities are also in point:

Bartlett vs. Wyman, 14 Johns., 260,
Dideon vs. Gridley, 15 C. B., 295.
Mallalien vs. Hodgson, 16 Q. R., 689,
Conover vs. Stillwell, 34 N. J. L., 54,
Cobb vs. Cowdry, 40 Vt.. 25,
Ford vs. Garner, 15 Ind., 298,
Runnamaker vs. Cordray, 54 Ill., 303.

SECOND.—Neither Charles McCulloch, as a trustee of water works, nor Charles Brackenridge, as chief engineer of the city, had any power to enter into a contract with the plaintiffs for crossing the river at Clinton street. It is not averred in the plaintiffs' pleadings, nor pretended that the testimony introduced, or any that the plaintiffs could have introduced, showed that said officers, or either of them, had any special authority from the city council to contract for the city in that behalf. If this work sued for was extra work, and outside of the contract made and ratified by the council, then a contract could only be made for it in the manner provided for it in the city charter. The charter contains specific provisions regulating the manner in which such contracts shall be let. These provisions are

necessary to guard the city against unjust and fraudulent contracts, and their effect is to inhibit all contracts not made in compliance with these provisions of the charter. For convenience I will reproduce them here:

Section 3270 of the Rev. Stat. of 1881, provides for the election of said trustees.

Sec. 3271 is in the following terms:

"Said trustees shall receive such compensation as the common council * * may determine, and shall give bond in such sum as the common council * * * shall order for the faithful performance of their duties, and the strict accounting for any funds that shall come into their hands; and they shall manage, conduct and control the works, furnish supplies of water, collect water rents, appoint all necessary officers and agents, and determine the tenure of office and amount of salaries of the officers and agents so appointed."

Sec. 3272. "Said trustees shall be authorized to make such by-laws and regulations as they may deem necessary for the safe, economical and efficient management and protection of water works; and such by-laws and regulations shall have the same validity as ordinances, when not repugnant thereto or to the Constitution and laws of the State."

Sec. 3273 provides only for apportioning and collecting water rents.

Sec. 3274 provides only for the application of surplus money arising from said rents.

Sec. 3275 requires the trustees to deposit the money arising from rents with the city treasurer, and report from time to time the condition of the funds, and the next section requires the treasurer to keep said moneys as a separate fund, and pay the same out on the order of at least two trustees.

Sec. 3277. "Said trustees shall be authorized to make contracts for

the erection of water works buildings, and construction of settling-basins and other appendages, and the enlargement and repair thereof; for the purchase of machinery, and the manufacture, laying down of pipe; for the furnishing and supplying with connections of all necessary fire-hydrants for fire department purposes, and for keeping the same in repairs; and for all other purposes necessary to the full and efficient management and construction of the water works; and such contracts shall be subject to the ratification by the common council."

The three next sections have no relation to the power of the trustees to contract.

Sec. 3281. "Said trustees before entering into any contract for work to be done, shall cause two weeks' notice to be given in one or more daily newspapers in general circulation within the city or town, that proposals will be received by the trustees for performing the work, or the several parts of the same, specified in said notice; and the trustees shall contract with the lowest bidder, if in their opinion, said lowest bidder can be depended on to do the work with ability, promptness and fidelity, which contract shall be subject to ratification by the common council, as heretofore provided; but if such be not the case, said trustees may give the contract to the next lowest bidder, or decline to contract, and re-advertise; or, if no daily newspaper be published in such city or town, then such notice shall be published three weeks consecutively in a weekly newspaper of general circulatiou within such city or town."

Sec. 3282. "Said trustees shall require bond to be given with good and sufficient security for the faithful performance of the work, but no member of said board of trustees shall be such security; nor shall any trustee be a contractor or in anywise, either directly or indirectly, be interested in any work to be contracted for. Such bond shall be submitted to the common council for approval."

These sections of the city charter include all the provisions of the law conferring power on the trustees of water works to enter into contracts on behalf of the city. There are no provisions in the charter authorizing the city to contract in any other way. The trustees can only enter into

contracts after advertising, and then before such contracts are operative they must be ratified by the council. The contract can only go into force after the bond is given by the contractor, and accepted by the trustees, and "*approved by the council.*"

Before a contract can become legally binding on the city the letting must be duly advertised; it must be ratified, and the bond of the contractor approved by the common council.

These propositions were considered carefully, and decided in the case of *Lee vs. The City of Racine*, reported in the *North-Western Reporter*, vol. 25, p. 33. In that case it was held that the statute in Wisconsin requiring the comptroller to countersign contracts rendered a contract without being thus countersigned invalid, and no recovery could be had for work done for the city under such contract. I give the full report of the case:

"LEE vs. THE CITY OF RACINE, filed October 13th, 1885. Appeal from Circuit Court of Racine County:

The parties entered into a contract, in writing, duly executed, by which the plaintiff agreed to excavate the earth, and put in a certain sewer in and for the defendant city, in accordance with certain plans and specifications which are made a part of the contract. The city agreed to pay him a stipulated price therefor at the time, and in the manner therein mentioned. The plans and specifications call for a sewer to be laid at certain inclinations or grades, starting at the water level of Lake Michigan, and they gave the required depth of excavation therefor. It turned out that there was a mistake in the surface grade as represented therein, and for several hundred feet it required from six inches to two feet excavation more than the plans and specifications called for in order to locate the sewer pipe at the prescribed grade. The plaintiff made the additional excavations, and laid the sewer according to contract. Before doing so, however, he informed the city surveyor,

who had charge of the work for the city, of the mistake, and told him that he could not do the additional work without extra charge. The surveyor replied: 'I suppose so, you have got to go ahead.' The city paid the plaintiff the contract price for constructing the sewer, and $48 on account of such additional excavation; and refused to pay more. This action is to recover further compensation to the amount of $392 for such extra work. The above facts appearing on the trial, the Court non-suited the plaintiff, who appeals from a judgment against him for costs rendered accordingly. Wyman & Roehr for appellant, Thomas Lee, Samuel Richie for respondent, City of Racine.

LYON, J.: The charter of the city of Racine, in a section prescribing the powers and duties of the city comptroller, provides as follows: 'He shall make, or cause to be made, estimates of the expenses of any work to be done by the city, * * * and countersign all contracts entered into by the city, and unless they be so countersigned, they shall have no validity, and no money shall be drawn from the city treasurer for work done on any contract before it is countersigned by him.' Laws 1876, c. 313, tit. 3, §5, p. 724. The plaintiff claims compensation for work done by him for the city under a contract, but shows no valid contract, because he fails to produce one countersigned by the comptroller. If it be claimed that the original contract (which was duly countersigned) was changed so as to include the additional excavation, then, because the alleged change increased the cost of the work the sanction of the comptroller was necessary to the validity of the new stipulations sought to be incorporated in the contract. If the contract was for extra work outside the original contract, there is no room to doubt or question that it is essential to its validity that it be so countersigned. Under the above provisions neither the surveyor, nor any other city officer, can bind the city by a contract for work, unless the contract is countersigned by the city comptroller, and the record shows no contract so countersigned, for doing the work in question. The non-suit was properly ordered. None of the cases cited hold otherwise, as we understand them; and, did they so hold, we couldn't follow them. The charter provision is imperative; it must be complied with or the city is not bound.

Judgment affirmed."

But these contracts are to be made by the board of

trustees, and not by any single trustee. No such power, directly or inferentially, is granted by any provision of the charter to a single trustee. To allow the exercise of such power by a single trustee, or all of them, would directly conflict with the provisions of the charter vesting the power in the board of trustees of water works and city council. As to the city civil engineer there is not a provision in the charter giving him any power, whatever, to make such promises as set forth in the complaint, and in the testimony, or to enter into any binding contract with the plaintiffs. I, therefore, insist that all said contracts or promises averred in the second paragraph of the complaint, and shown by the testimony to have been entered into after the work was commenced under the written contract are void as to the city for the reasons above stated.

First.—Because the same were without consideration as the city received nothing for them except what she had the right to have done under the written contract.

Second.—Because neither said Charles McCulloch, nor the civil engineer, nor even the board of trustees of water works, had power to enter into said contracts.

Because said contracts or promises were not let or made after advertisements or bids for work, nor were the same ratified or approved by the common council.

FIRE-BOXES AND SPECIAL CASTINGS.

These are small items, and the foregoing discussion disposes of them, also, if correct.

As to the Special Castings.—I submit the following provision in the contract covers the plaintiffs' claim for delay in their being furnished, p. 8, printed contract:

"All pipes, special castings, stop-cocks, check-valves and hydrants will be furnished to the contractor in the city pipe-yard or on the cars upon which they are received from the foundry. They will be delivered to him as soon as received, and it shall be his duty to notify the engineer of any defects or breakage before removal from cars, otherwise all damage arising from such cause shall be made good by said contractor. The contractor shall have no claim upon the city for any delay in the delivery of pipes or other material from the manufacturers."

By this section the contractor assumes the burden of detecting all the defects in the special castings complained of before they left the cars or pipe-yard, and become responsible to the city for any loss suffered from failure to discover said defects, and to notify the officers of the city thereof, and for any delay caused the contractor "*is to have no claim upon the city.*"

Fire-Boxes.—What these were appears by Mr. Inman's testimony, questions 114 to 127, printed Rec. p. 31 and 32. They consist in what are termed, in the contract, valve-boxes, and are described in the last foregoing quotation from the contract. The size of these boxes is no where specified in the contract, but were to be furnished by the contractor as a part of his contract for laying pipe, and were covered by the price paid for that work. "Stop-cocks, air-cocks, check-valves and hydrants" were to be furnished to the contractor. See Rec. p. 8.

As part of the pipe-laying the contractor was to "furnish and set all stop-cock and air-cock boxes, including the fitting and securing the iron covers for the sum of —— each; cost is included in price for pipe-laying. P. 12, printed Rec. But on p. 10, top of page, "these boxes are to be made of the form and dimensions shown on the plans furnished and approved by the engineer." But if

the dimensions of these boxes were not shown on the plans, then, by the contract, they are to be furnished and put in by the contractor to the approval of the engineer. This is exactly what was done, and I insist, was no more than a fair performance of the contract.

The city asks the judgment to be affirmed.

L. M. NINDE,

Attorney for Defendant in Error.

ANSWER TO PLAINTIFF'S BRIEF.

——:o:——

Since the foregoing argument was in print, I have received from counsel of the Plaintiffs in Error his brief in this case.

I respectfully submit that the learned counsel has given one ground for the decision under review while the Court below placed it upon an entirely different ground.

I concede that the want of a "written order" would have been no defence to a suit for "extras," if otherwise a valid claim. The Defendant in Error insists, as the Court below held, that the claim sued for as "extras" was within the contract, and done in discharge of obligations assumed by the Plaintiffs in entering into it. If this theory is correct the judgment ought not to be reversed. But if said extra work sued for in the second paragraph of the complaint was not within the contract, or covered by its terms, then the city is not liable therefor, and the judgment below is right.

The Defendant insists that the increased labor and materials necessary in crossing the St. Marys river on Clinton street, beyond what would have been necessary in crossing on Calhoun street, were work and materials

which the Plaintiffs, by the terms of the written contract, agreed to do and furnish for the compensation therein stipulated, and were not in any sense extra work and materials.

I do not understand this proposition to be controverted by the Plaintiffs in Error. Indeed their learned counsel insists that they were done and furnished under the following clause of the contract:

"The said trustees shall have the right to make any alterations in the extent, dimensions, form, or plan of the work contemplated by this contract, either before or after the commencement of construction. If such alteration diminish the quantity of work, the price paid shall be proportionately diminished, and no anticipated profits allowed for the work omitted. If they increase the work such actual increase to be paid for at contract rate for work of its class."

The Plaintiffs in Error insist "that this clause places claims for additional work done in pursuance of a change of plan upon an entirely different footing from the extra work mentioned in a former clause."

The real question is:

Does this clause of the contract bind the city to pay for what is claimed to be increased difficulties in crossing the river at Clinton street beyond what would have been met with in crossing on Calhoun street?

The right or power of the trustees to *alter the plans* of the work in its *extent or dimensions* is not questioned, and is unquestionable. When *altered*, the plan as altered, became the work contracted for, and was to be paid for at contract prices. The plans and specifications, when *altered*,

became the plans and specifications covered by the contract. The change from Calhoun street to Clinton street, when made, had the effect to exclude Calhoun street from the line of the main pipe, and to include Clinton street as part of said line of main pipe. When Clinton street thus becomes a part of the plan, and the laying of the pipe across the river there, is thus covered by the contract, why is not the price also fixed by the contract?

The record shows that the length of the main pipe was shortened by this change. The contract provides "*that the price shall be proporately diminished,*" and no profits for the omitted work allowed. How can the Plaintiffs in Error sue for this work in controversy when the contract covers it and fixes the price for it, which price they have already collected. I insist that there is no escape from this conclusion unless the last sentence of the clause changes the result. This sentence provides that if such change of plan shall increase the work "such actual increase to be paid for at contract rate for such work of its class."

The Plaintiffs in Error insist that this change of plan increased their work. Suppose it did. Is it the increase of such work as should be paid for "*at contract rate for work of its class?*"

These words show that the increased work must be such as belongs to a class of work, the price of which is fixed by the contract. No other increased work can be paid for under the contract. This increased work belongs to no class of work, the price of which is fixed by the

contract. But it is increased work resulting from unforeseen obstructions. The class of work was "pipe-laying," and "the trenches for the pipes shall be opened in accordance with lines and grades given, and directed by the Engineer."

For this work of laying this twenty-four inch pipe, including the excavation and refilling of trenches; all "bailing and shoring, and ramming," and everything else possibly necessary, the price per lineal foot is fixed by the contract at sixty cents.

This work sued for is incidental to the pipe-laying across the river at that point. Like numerous other items required by the contract, it had to be performed before the Plaintiffs in Error could complete their undertaking. No price was fixed, by the contract, to any of these incidental or collateral items, but were all covered by the prices fixed for the principal classes of work. The contract thus requiring this incidental work to be done, the contractors are bound to perform it although no special compensation is provided in terms for it. To fix a price now for each of these incidental items would be to change the contract or make one for the parties. The Court will not thus interpolate stipulations into a contract which the parties themselves omitted. The Plaintiffs in Error not only failed to have a clause inserted in the contract relieving them from this incidental work and out-lay, but actually bound themselves to do it.

"If the parties have made no dispensation the rule of law gives none. It does not allow a contract fairly made to be annulled, and it

does not permit to be interpolated what the parties themselves have stipulated."

Ingle vs. Jones, 2 Wall., 763.

If the parties deviate from the terms of the contract, the price fixed by the contract, so far as applicable, will measure the recovery upon it. If this contract had been terminated by the city after the plan was changed to Clinton street, and the pipe-laying would have cost less than the contract price per foot, the contractors would clearly have the right to recover the difference between the cost and contract price as profits. But the contractors could not recover the profits for the work done on the common counts.

Clark vs. The Mayor of New York, 4 N. Y., 338.

If the work sued for is covered by the contract the contractors cannot recover for it unless the contract itself provides for payment for it. If no price is fixed by the contract it will be intended that the prices fixed for the general undertaking was to include and be deemed a payment for this. Therefore, I insist that there can be no recovery on the second paragraph of the complaint on the contract itself. Neither can there be a recovery upon the common counts in this case for the work sued for if by the terms of the contract it was included therein, and the plaintiffs bound themselves to do it.

A contractor after a full performance of a contract can sue for the price, of course, and recover upon the common counts. But in such case he recovers only the contract price, and in this case the contract price for the whole undertaking was paid, except the $4,100

included by agreement in the judgment. If the work sued for is indeed covered by the contract, the right to recover upon the common counts is no better than the right to recover upon the contract under the second paragraph. The recovery upon either must be for the same identical cause of action, and determined by the same principles. The city has not repudiated the contract, neither have the Plaintiffs in Error, and the contract in such case measures the compensation to be paid. If, therefore, the work sued for in overcoming the obstructions met with in laying the pipe across the river on Clinton street, was within the Plaintiffs' undertaking, and no price or compensation provided for it by the contract, and no work of *that class* was to be paid for by the terms of the contract no recovery can be had upon either the special or common counts of the complaint.

If, however, the Court should be of the opinion that the work and materials sued for were *extra work and materials*, and not provided for at all in the contract, then, of course, a just compensation could be recovered therefor under the common counts, if the city under all the circumstances has rendered itself liable therefor. None of the testimony stricken out showed, or tended to show, that the Common Council ever took any action in reference to this *extra work*, if such it was. Neither was it proposed by the Plaintiffs to introduce any such testimony. But the whole subject was by the agreement or understanding between the Trustees of Water Works, and the Plaintiffs to be concealed from the Common Council. See the testimony of Mr. Inman, on p 23, printed record;

and also the testimony of Mr. Newhall, on p 35. The question, therefore, arises whether the Trustees of Water Works or the Engineer had any power to bind the city for this work. Neither was it proposed to offer any testimony that the Common Council had any such knowledge of the progress of this work, or of its acceptance, as would tend to bind the city, on the ground of its assent to or acceptance of the work. The Common Council was relieved from the actual management of the work by the Statutes already cited, creating the Water Works Trustees, and defining their powers and duties already cited. By these Statutes the said Trustees had no power to bind the city by any contract, express or implied. All their agreements had to be approved by the Common Council before they had any validity whatever. It would seem to be impossible that an understanding between the Plaintiffs in Error, and two of the Water Works Trustees, which by its terms was to be kept secret from the Common Council, should bind the city. Any implied assent or acceptance by the city is entirely wanting, and in the absence of an express agreement, no obligation could arise. But even if the circumstances were such as to raise an implied promise to pay for this work between persons generally, I insist that the city cannot, under the Statutes, already cited, thus bind itself to pay.

Since the first part of this brief was prepared, His Hon., Judge Woods, has passed upon a case in the Circuit Court of this District in which he, as the Supreme Court of Wisconsin did in *Lee vs. The City of Racine*, above cited, held that a claim entirely similar to the one

in suit, could not be enforced. The entire opinion is as follows:

"*Richardson vs. Grant County*, Dist. Indiana. At Law:

WOODS, J, The complaint charges an indebtedness of the Defendant to the Plaintiff in the sum ef $24,000, for materials furnished, work and labor done, skill bestowed, and money paid out by the Plaintiff at the special instance of the Defendant's Board of Commissioners, in the construction of a court house for the Defendant. A proper bill of particulars is filed, and it is averred that the Board of Commissioners for the County has received, and is in the enjoyment of the said work and labor and materials.

The fourth paragraph of answer is to the effect that no plans and specifications for the work were ever made and adopted by the Board of Commissioners, and filed, as required by law, and no advertisement made for bids for doing the work, and furnishing the materials; nor were any bids presented to, or received by the Board.

To this answer the Plaintiff has demurred for want of facts stated sufficient to constitute a good defense to the action.

By the first section of an act of the Indiana Legislature. which took effect August 24, 1875, it is provided that 'it shall not be lawful for any Board of County Commissioners, in this State, to make any contract for the construction of any court house, jail, or any other county or township building, or monument, until plans and specifications have been adopted by such Board, and * * * deposited in the office of the auditor of such county, and open to inspection of the people of such county. All contracts attempted to be made in violation of the foregoing provisions shall be null and void.'

The next section provides that when such plans and specifications shall have been adopted and filed, the Board shall not contract for, or let, the proposed work 'until it has advertised such letting, and requested bids for the same, in a manner prescribed, with a reference to such plans and specifications; *provided*, that the provisions of this act shall not apply to buildings when the cost of the same shall not exceed five hundred dollars.'

The next section requires the Board to let the contract to the lowest bidder, and to require of him a bond and security for the faithful performance of the work, according to the plans and specifications so deposited. Rev. Stat., 1881, §§ 4243, 4245.

It is conceded, as I understand, that under these statutory provisions no special contract for the work done by the plaintiff, not made in substantial conformity with the statute, could be enforced; but the plaintiff insists that, upon the averment that the Board of Commissioners, acting for the county, had received and was in the enjoyment of the work done and materials furnished by him, he is entitled, upon the common count, to recover the *quantum meruit*. Neither upon authority, nor in reason, as it seems to me, can this be so. In the common count it is necessary to aver, and the plaintiff has averred, that the work was done at the special request of the defendant—that is to say, of its Board of Commissioners. This statute, however, expressly forbids such request or assent on the part of the Board. Of this the plaintiff was bound to take knowledge, and consequently is placed in the attitude of one who has done a voluntary service, for which he can legally claim no recompense. The common count or claim to recover a *quantum meruit* must rest upon an implied promise or liability; but where a municipal body is required to make certain contracts in a prescribed way, and forbidden to make them in any other way, there is left no room for an implied obligation. In this case the statute, in express terms, declares any attempt to make a contract, without the plans and specifications required, null and void; but without this, the effect of the express prohibitions of the act would doubtless be, in this respect, the same. The Board being forbidden to make such contracts, it would seem could not, by any act of ratification, create an obligation upon the county. Private corporations may, doubtless, incur liability by reason of contracts made in excess of their powers, and even public or municipal corporations may be liable in supposable cases for money or property received on contracts into which they had no power to enter; but in respect to services rendered which cannot be rejected or returned, and in respect to work and labor done, and material furnished in the construction of public buildings, erected on public grounds, there being in the nature of things no choice whether or not there shall be an acceptance or rejection of the work, the rule ought to

be, and I understand is, different. This is certainly so when the liability is sought to be established upon transactions done 'in disregard of positive prohibitions.' *Dill. on Mun. Corp.*, secs 381, 388, and authorities cited. It follows that the demurrer to the answer should be overruled. So ordered."

April 24, 1885.—On motion for re-hearing:

WOODS, J. "A re-hearing upon the demurrer is asked. Counsel for Plaintiff now insisting, notwithstanding the requirements and inhibition of the Statute, that during construction of a court house or other county building, under a contract made in accordance with the law, changes may be made in the plans and contract, for additional work entered into, though the cost thereof be greater than $500. I cannot concur with this view. Under such a construction the law would apply only to contracts for the construction of an entire building, and could be evaded and practically nullified in most cases by making, without plans and specifications, and without advertisement, seperate contracts for the different parts of the structure. Re-hearing denied."

27, *Federal Reporter*, 495.

If the theory of this case, and the case cited from the *Northwestern Reporter*, vol. 25, p. 33, are good law, the city itself, through its Common Council could not have entered into an express contract, even without advertisement, or bidding for this work so as to bind the city.

LINDLEY M. NINDE,

Attorney For Defendant in Error.